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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964/1965

No. 60742

RALPH GINZBURG, ET AL., PETITIONERS,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1965

CERTIORARI GRANTED APRIL 5, 1965

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Docket Entries

- | <i>Date</i>
1963 | <i>Proceedings</i> |
|---------------------|---|
| 1 Mar. 15 | —True Bill. |
| 2 Mar. 15 | —Motion and Order for summons as to Documentary Books, Inc., filed. Summons exit. |
| 3 Mar. 13 | —Motion and Order for summons as to Eros Magazine, Inc., filed. Summons exit. |
| 4 Mar. 13 | —Motion and Order for summons as to Liaison News Letter, Inc., filed. Summons exit. |
| 5-7 Mar. 28 | —Summons returned "on 3-22-63 served Documentary Books, Inc., Eros Magazine, Inc. and Liaison News Letter, Inc." and filed. |
| 8 Apr. 10 | —Defendants' motion for bill of particulars, filed. |
| 9 Apr. 11 | —Defendants' motion to dismiss indictment, filed. |
| 10 May 7 | —Motion to strike affidavit and exhibits appended to defendants' motion to dismiss indictment filed. |
| 11 May 7 | —Order of Court that motion to strike defendants' affidavit etc. shall be argued at the same time as defendants' motion to dismiss cts. 1 through 8 etc. filed. Noted 5/8/63. |
| — May 8 | —PLEAS: NOT GUILTY as to all defendants on all Counts. (Argument on all motions fixed for 5/17/63 at 2 P. M.) |
| 12 May 8 | —Stipulation of counsel in lieu of defendants' motion for Bill of Particulars and Order of Court approving same, filed. Noted 5/9/63. |

Docket Entries

- | <i>Date</i>
1963 | <i>Proceedings</i> |
|---------------------|---|
| 13 May 14 | —Petition for and Order permitting American Civil Liberties Union to file a brief as an amicus curiae, filed. 5-15-63 noted & notice mailed. |
| 14 May 17 | —Order of Court that the affidavit and 69 exhibits annexed to defts. motion to dismiss are stricken from said motion, filed. 5-20-63 noted & notice mailed. |
| — May 17 | —Hearing sur defendants' motion to dismiss, plaintiff's motion to strike affidavits on defendants' motion to dismiss —denied: plaintiff's motion to strike GRANTED—defendants' motion to dismiss—C. A. V. |
| 15 May 21 | —Transcript of hearing of 5-17-63, filed. |
| 16 May 23 | —Order of Court DENYING defendants' motion to dismiss, filed. 5-24-63 noted & copies mailed. |
| — Jun. 10 | —Non-jury trial—witnesses sworn. |
| 17 Jun. 10 | —Waiver of trial by jury, filed. |
| — Jun. 11 | —Trial resumed. |
| — Jun. 12 | —Trial resumed. |
| — Jun. 13 | —Trial resumed. |
| — Jun. 14 | —Trial resumed. |
| — Jun. 14 | —VERDICT: |

As to Ralph Ginzburg—GUILTY on
Cts. 1 to 28 Incl.

As to Documentary Books, Inc.—
GUILTY on Cts. 1, 2 & 3, 11 to 16
Incl.

Docket Entries

Date
1963

Proceedings

As to Eros Magazine, Inc.—GUILTY on Cts. 7, 8, 9, 10, 17, 18, 19, 20, 21 & 22.

As to Liaison News Letter, Inc.—GUILTY on Cts. 4, 5, 6, 23, 24, 25, 26, 27 & 28 (bail of R. Ginzburg to be entered in \$10,000).

- Jun. 14 —Bond of R. Ginzburg in \$10,000 with Public Service Mutual Ins. Co. as surety, filed.
- 18 Jun. 19 —Stipulation that defendants shall have 25 days from 6-14-63 within which to file motion for new trial, and Order approving same, filed. 6-20-63 noted.
- 19 Jun. 27 —Defendants' motion in arrest of judgment or for new trial, and Memorandum in support thereof, filed.
- 20-24 Jun. 28 —Transcript of testimony of June 10 thru 14, 1963, filed.
- 25 Aug. 6 —Special Findings of Facts, Body, J., filed. 8-6-63 notice mailed.
- 26 Aug. 27 —Stipulation of counsel and Order of Court directing that Defendants' Motion in Arrest of Judgment, etc., shall be considered on written briefs, etc., and without oral argument, filed.
- Sept. 17 —Defendants' motion in arrest of judgment or for a new trial—submitted on briefs. C. A.: V.
- 27 Sept. 23 —Transcript of pleas, filed.

Docket Entries

Date
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Proceedings

- 28 Nov. 21 —Opinion, Body, J. and Order DENYING defendants' motions in arrest of judgment, and in the alternative, for a new trial, and that defendants are called for sentence on Nov. 27, 1963 at 10 a. m., filed. 11-22-63 entered & notice mailed.
- Dec. 19 —SENTENCE as to Ralph Ginzburg:
- On each of Counts 1 to 10 inclusive—
Fine \$1,000.00.
- On each of Counts 11 to 16 inclusive—
Fine \$1,000.00, imprisonment for 3 years, to run concurrently.
- On each of Counts 17 to 22 inclusive—
Fine \$1,000.00, imprisonment for 2 years, to run concurrently with each other and consecutively with sentence imposed on Counts 11 to 16.
- On each of Counts 23 to 28 inclusive—
Fine \$1,000.00 (Total Fines \$28,000.00 and Total Imprisonment—5 years).
- Dec. 19 —SENTENCE as to Documentary Books, Inc.:
- On each of Counts 1 to 3 and 11 to 16 inclusive: Fine \$500.00 (Total Fine \$4,500.00).
- Dec. 19 —SENTENCE as to Eros Magazine, Inc.:
- On each of Counts 7 to 10 and 17 to 22 inclusive: Fine \$500.00 (Total Fine \$5,000.00).

*Docket Entries**Date*

1963

Proceedings

- Dec. 19 — SENTENCE as to Liaison News Letter, Inc.:

On each of Counts 4 to 6 and 23 to 28 inclusive: Fine \$500.00 (Total Fine \$4,500.00).

Eo Die: Execution of sentences stayed pending appeal. Bail fixed at \$10,000.00.

- 29 Dec. 19 — Notice of appeal by defendants, filed. Copy to U. S. Atty. and U. S. Court of Appeals on 12-20-63.

- 30 Dec. 19 — Copy of Clerk's statement of docket entries to U. S. Court of Appeals, filed.

- Dec. 19 — Bail bond on appeal of Ralph Ginzburg in \$10,000 with Resolute Insurance Co. as surety, filed.

1964

- 31 Jan. 6 — Transcript of sentence filed.

- 32 Jan. 8 — Memorandum Re: Impoundment of Exhibits, filed.

- Jan. 10 — Record transmitted to United States Court of Appeals.

- 33 Jan. 10 — Judgment and Commitment, as to Ralph Ginzburg, filed.

- 34 Jan. 10 — Judgment and Commitment as to Documentary Books, Inc., filed.

- 35 Jan. 10 — Judgment and Commitment as to Eros Magazine, Inc., filed.

- 36 Jan. 10 — Judgment and Commitment as to Liaison News Letter, Inc., filed.

Indictment

COUNT I

THE GRAND JURY CHARGES:

On or about November 15, 1962, Ralph Ginzburg and Documentary Books, Inc., the defendants herein, and each of them, at Philadelphia, Pa., in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail according to the direction thereon to Dona Tobin, 500 E. Willow Grove Ave., Phila., Pa., certain non-mailable matter, to wit: a written and printed card, letter, circular, advertisement, and notice giving information, directly and indirectly, where, and how, and from whom, and by what means a certain obscene, lewd, lascivious, indecent, filthy and vile book and writing entitled, "The Housewife's Handbook on Selective Promiscuity," by Rey Anthony, may be obtained, and which said book and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

COUNT II

[Count II is identical to Count I except that the date of mailing is November 17, 1962 and the addressee is Wilbur J. D. Ingham, 1010 Winchester Street, Philadelphia 11, Pennsylvania.]

COUNT III

[Count III is identical to Count I except that the date of mailing is December 12, 1962, the place of use of mails is Havertown, and the addressee is Russell N. Leidy, 209 James Drive, Wynne Glade, Havertown, Pennsylvania.]

Indictment

COUNT IV

THE GRAND JURY FURTHER CHARGES:

On or about November 27, 1963, Ralph Ginzburg and Liaison News Letter, Inc., the defendants herein, and each of them, at New Hope, Penna., in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail according to the direction thereon to Lisette R. Peters, 111 Chapel Road, New Hope, Pennsylvania certain non-mailable matter, to wit: a written and printed card, letter, circular, advertisement, and notice giving information, directly and indirectly, where, and how, and from whom, and by what means a certain obscene, lewd, lascivious, indecent, filthy and vile pamphlet and writing entitled, "Liaison" may be obtained, and which said pamphlet and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

COUNT V

[Count V is identical to Count IV except that the place of use of mails is Havertown and the addressee is Miss Mamie Foery, 6 East Mercer Avenue, Havertown, Pennsylvania.]

COUNT VI

[Count VI is identical to Count IV except that the place of use of mails is Paoli and the addressee is Eleanor Callahan, 9 South Valley Road, Paoli, Pennsylvania.]

Indictment

COUNT VII

THE GRAND JURY FURTHER CHARGES:

On or about November 17, 1962, Ralph Ginzburg and Eros Magazine, Inc., the defendants herein, and each of them, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail according to the direction thereon to Rev. John E. Greening, Burhoime Baptist Church, 905 Cottman Avenue, Philadelphia 11, Pa. certain non-mailable matter, to wit: a written and printed card, letter, circular, advertisement, and notice giving information, directly and indirectly, where and how, and from whom, and by what means a certain obscene, lewd, lascivious, indecent, filthy and vile book and writing entitled, "Eros" may be obtained, and which said book and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

COUNT VIII

[Count VIII is identical to Count VII except that the date of mailing is December 18, 1962, the place of use of mails is Rosemont, and the addressee is Mother Mary Martha, Rosemount College, Rosemont, Pennsylvania.]

COUNT IX

[Count IX is identical to Count VII except that the date of mailing is March 24, 1962, the place of use of mails is Chester, and the addressee is Tom Kaufman, 118 Westminster Street, Chester, Pa.]

Indictment

COUNT X

[Count X is identical to Count VII except that the date of mailing is December 11, 1962, the place of use of mails is Elkins Park, and the addressee is Ogaontz Jr. Hi. Sch., Highschool Rd. & Montgomery Ave., Elkins Park, Pa.]

COUNT XI

THE GRAND JURY FURTHER CHARGES:

On or about Dec. 12, 1962, Ralph Ginzburg and Documentary Books, Inc., the defendants herein, and each of them, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail, according to the direction thereon to Mr. H. J. Zimmermann, 219 Rosemary Lane, Phila. 19, Pa. certain non-mailable matter, to wit; an obscene, lewd, lascivious, indecent, filthy and vile book and writing, entitled: "The Housewife's Handbook on Selective Promiscuity", by Rey Anthony, and which said book and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

COUNT XII

[Count XII is identical to Count XI except that the addressee is Harold Willier, 59 W. Wyneva St., Phila. 44, Pa.]

COUNT XIII

[Count XIII is identical to Count XI except that the addressee is P. C. Pfaff, 1002 Piermont St., Phila. 16, Pa.]

Indictment

COUNT XIV

[Count XIV is identical to Count XI except that the addressee is Francis H. Weinraub, 6312 Trotter St., Phila. 11, Pa.]

COUNT XV

[Count XV is identical to Count XI except that the addressee is Mervin L. Dissinger, Box 6, Johnson Hall, Temple University, Phila. 22, Pa.]

COUNT XVI

[Count XVI is identical to Count XI except that the addressee is H. Hoffmann, 1122 Spruce St., Phila. 7, Pa.]

COUNT XVII

THE GRAND JURY FURTHER CHARGES:

On or about March 14, 1963, Ralph Ginzburg and Eros Magazine, Inc., the defendants herein, and each of them, at Gladwyne, Pa., in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail, according to the direction thereon to Mrs. J. A. Carlson, 1618 Sweetbriar Rd., Gladwyne, Pa., certain non-mailable matter, to wit: an obscene, lewd, lascivious, indecent, filthy and vile book and writing, entitled: "Eros", designated Winter 1962, Vol. I, No. 4, and which said book and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

Indictment

COUNT XVIII

[Count XVIII is identical to Count XVII except that the place of use of mails is Philadelphia and the addressee is William Selmi, Jr., 113 S. Beechwood St., Phila. 3, Pa.]

COUNT XIX

[Count XIX is identical to Count XVII except that the place of use of mails is Philadelphia and the addressee is Dr. Ann H. Ford, 1935 Panama St., Phila. 3, Pa.]

COUNT XX

[Count XX is identical to Count XVII except that the place of use of mails is Philadelphia and the addressee is William E. Grancell, 1810 Rittenhouse St., Phila. 3, Pa.]

COUNT XXI

[Count XXI is identical to Count XVII except that the place of use of mails is Philadelphia and the addressee is Mrs. P. Wilson Daily, 324 Spruce St., Phila. 6, Pa.]

COUNT XXII

[Count XXII is identical to Count XVII except that the place of use of mails is Philadelphia and the addressee is Mrs. P. Wilson Daily, 324 Spruce St., Phila. 6, Pa.]

COUNT XXIII

THE GRAND JURY FURTHER CHARGES:

That during the period from on or about November 5, 1962, to on or about January 2, 1963, the exact date to this

Indictment

Grand Jury unknown, Ralph Ginzburg and Liaison Newsletter, Inc., the defendants herein, and each of them, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly use the mails for the mailing, carriage in the mails, and delivery of certain non-mailable matter, and did knowingly cause to be delivered by mail, according to the direction thereon to J. Wallace Davis, 135 South 18th Street, Philadelphia 3, Pennsylvania, certain non-mailable matter, to wit: an obscene, lewd, lascivious, indecent, filthy and vile pamphlet and writing, entitled: "Liaison", Vol. I, No. 1, and which said pamphlet and writing is too obscene, lewd, lascivious, indecent, filthy and vile to be set forth in its entirety upon the records of this Honorable Court, but profert whereof is here made.

In violation of Title 18, United States Code, § 1461.

COUNT XXIV

[Count XXIV is identical to Count XXIII except that the addressee is Raymond W. Engel, Meadow Lane, Philadelphia 14, Pennsylvania.]

COUNT XXV

[Count XXV is identical to Count XXIII except that the addressee is Willard Fish, P. O. Box 7584, Philadelphia 1, Pennsylvania.]

COUNT XXVI

[Count XXVI is identical to Count XXIII except that the place of use of mails is Jenkintown and the addressee is J. Whiting Friel, 795 Glen Road, Jenkintown, Pennsylvania.]

Indictment

COUNT XXVII

[Count XXVII is identical to Count XXIII except that the place of use of mails is Valley Forge and the addressee is G. C. Godwin, Welsh Valley Road, Valley Forge, Pennsylvania.]

COUNT XXVIII

[Count XXVIII is identical to Count XXIII except that the addressee is George D. Morton, 5346 Chew Ave., Apt. 9A, Philadelphia 38, Pennsylvania.]

Defendants' Motion to Dismiss Indictment Under Rule 12 of the Federal Rules of Criminal Procedure

Defendants, Documentary Books, Inc., Liaison News Letter, Inc., and Ralph Ginzburg move to dismiss Counts 1 through 6, 11 through 16, and 23 through 27 of the indictment under Rule 12 of the Federal Rules of Criminal Procedure.

As grounds for this motion defendants state:

1. Prosecution for mailing of the material referred to in Counts 11 through 16 of the indictment is barred by the First Amendment to the Constitution of the United States;
2. The materials referred to in Counts 1 through 6, 11 through 16, and 23 through 27 of the indictment are not "obscene" within the meaning of 18 U. S. C. § 1461;
3. 18 U. S. C. § 1461 is unconstitutional and in violation of the First, Fifth, and Sixth Amendments to the Constitution of the United States in that the statutory standard of obscenity provides no reasonable ascertainable standard of guilt.

Affidavit of Ralph Ginzburg

As further grounds for this motion, defendants refer the Court to the affidavit and exhibits annexed and to defendants' memorandum of law.

DAVID I. SHAPIRO
1411 K Street N. W.
Washington 5, D. C.

SIDNEY DICKSTEIN
1411 K Street N. W.
Washington 5, D. C.

NORMAN A. OSHTRY
20 South 15th Street
Philadelphia 2, Pennsylvania
Attorneys for Defendants

**Affidavit of Ralph Ginzburg, Read in Support of
Foregoing Motion**

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RALPH GINZBURG, being duly sworn, deposes and says that I am one of the defendants in this action and submit this affidavit in support of defendants' motion to dismiss the indictment under Rule 12(b) of the Federal Rules of Criminal Procedure.

1. "The Housewife's Handbook on Selective Promiscuity" is filed separately with this motion as defendants' Ex. A.

2. Liaison, Vol. I, No. 1, is filed separately with this motion as defendants' Ex. B.

Affidavit of Ralph Ginzburg

3. The advertising material referred to in Counts 1 through 3 of the indictment is annexed to this affidavit as defendants' Ex. C.

4. The advertising material referred to in Counts 4 through 6 of the indictment is annexed to this affidavit as defendants' Ex. D.

5. The reviews of the "Housewife's Handbook on Selective Promiscuity" appearing in Vol. IX. of the *Journal of Human Relations*, Summer 1961 and in the *Journal of American Institute of Hypnosis*, January, 1962 are both annexed hereto as defendants' Ex. E.

6. Prior hereto, and in February, 1962, I wrote over one thousand prominent persons requesting their views on the Housewife's Handbook. I asked them to:

a. Set forth their academic degrees and professional attainments;

b. State what was "hard-core" pornography as measured by contemporary national standards;

c. State whether, in their opinion, the Housewife's Handbook was "hard-core" pornography and if it was, why so, and if it was not, why not; and

d. State their views as to the value, if any, of the Housewife's Handbook to society.

7. All responses which in any way purported to respond to one or more of these questions are annexed hereto as defendants' Exs. 1 through 69. 7 of these exhibits, or about 10%, express the view that the Housewife's Handbook is pornographic.

8. I am informed that prior to the time that defendant Documentary Books, Inc. purchased the reprint rights of

Exhibit E

"The Housewife's Handbook on Selective Promiscuity", Seymour Press, the original publisher, sent said book through the mails with full knowledge of the Post Office for a period of eighteen months and continues to do so to this day.

RALPH GINZBURG

(Sworn to April 11, 1963.)

Exhibit E, Annexed to Foregoing Affidavit

JOURNAL OF THE AMERICAN INSTITUTE OF HYPNOSIS,
JANUARY 1962, LOS ANGELES, CALIF.

REVIEWED BY WM. J. BRYAN, JR., M.D.

The Housewife's Handbook of Selective Promiscuity

By Rey Anthony
Seymour Press; Tuscon Arizona

This mistitled work is neither a handbook nor a treatise on promiscuity. It is on the contrary a brilliant and skillfully written autobiography of a woman who through her own searching analyses has been able largely to free herself from the guilt which permeates the great majority of American adult women (and to a lesser extent, men) on the subject of their sexual behavior. By artfully relating her own experiences, Mrs. Anthony indirectly *shows* the reader rather than tells him how these terrible misconceptions about sex adversely influence the lives of millions of Americans daily. For example, she relates an incident at age 4, during which she became curious about the difference between her sexual organ and that of a small neighborhood boy. The most informed parents today realize such sexual curiosity among young children is normal and treat it as normal behavior, calling for no special comment. Mrs. Anthony relates: "My mother screamed, 'I'll teach you' and

Exhibit E

she shouted, 'don't ever let me catch you doing that again.' She didn't."

Her short humorous replies to her mother's hysterical behavior point up the effect that poor sexual education in childhood results in neurotic behavior in adulthood because of the conflict between normal sexual emotions and drives as opposed to guilt feelings introduced by arbitrary standards of conduct of a half century ago.

Actually it is surprising that this book has never been written a hundred times in the United States already. Her history is no different than the vast army of women, and men too for that matter, who visit the psychoanalyst and the hypnoanalyst daily. In fact, her story is really not different from many average Americans. The great difference lies in the fact that she *tells* her story and she feels no guilt regarding it. The only really bad feature of the book is one last page consisting of a complete misinterpretation of the Holy Bible by a Doctor Robert Lindner which could and should be completely left out. It is not a handbook nor a guide to sexual behavior. Each individual's sexual behavior, like every other part of his behavior, must be decided upon on an individual basis according to his needs and the needs of society around him together with the ethical, moral force by which he lives. The importance in the publication of this book as I see it lies, by and large, together with the importance of the Kinsey Report. That is to say, books like these show us not necessarily what the American female should do or should not do, but what she *IS DOING*. To a great extent it points up with knife-edge sharpness the gross inadequacies regarding sexual education of children and teen-agers. In addition to this, a great many ideas will no doubt cross the reader's mind where research could be done in the field of frigidity, impotence, and other sexual maladies because of the forthright, clearly written autobiography by Mrs. Anthony. The discussion of semantics in sex is superb. Published by Seymour Press, Tucson, Arizona.

Exhibit E

JOURNAL OF HUMAN RELATIONS
SUMMER, 1961 VOL. IX: p. 513
REVIEWED BY DR. ROBERT M. FRUMKIN

The Housewife's Handbook for Promiscuity. Rey Anthony.
Tucson: Seymour Press, 1960.

While the title of the book is somewhat misleading, the contents are not. This book is a profound personal document, a social psychological autobiography, as well as a treatise on sex education. Although it is written for the layman as a personal document, as an introspective study of human interpersonal relations it is of great significance and interest to the behavioral and social scientists, to social workers, marriage and family counselors, lawyers, physicians, anyone who is concerned theoretically or practically with the betterment of human relations.

Mrs. Anthony has been married and divorced three times. She has learned a great deal about sexual behavior during her thirty-six years which are covered in her autobiography. As the mother of four daughters she is quite concerned about sexual attitudes and practices in the United States. At recent meetings of the American Association of Marriage Counselors and other professional groups, Drs. Mary Calderone, Sophia J. Kleegman, and Lena Levine, among other experts on women's problems, have talked much about the need for detailed accounts of a woman's reactions to her sexual experiences, for a longitudinal study of the sexual development and sex education of a woman. Mrs. Anthony's book is that kind. It is one of the few books written today which provides a sane sexual philosophy and program of sex education in a society that some authorities have described as "sexually insane." In fact, this reviewer feels that Mrs. Anthony's book has all the earmarks of a classic on human relations, like Clifford

Defendants' Exhibit 1

W. Beers' *A Mind That Found Itself*. For it is a work inspired by lessons learned from human suffering, and inspired by and full of the love and warmth that sometimes are created in the most tragic and deleterious surroundings.

This book, in short, is one of the most valuable publications on human relations which the author has ever read. He recommends it highly to everyone concerned about the betterment of human relations.

State University of New York

Defendants' Exhibit 1, Annexed to Foregoing Affidavit

DR. THEODOR REIK
401 West End Avenue
New York 24, N. Y.

ENDicott 2-5582

February 14, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

Recovering from a serious illness I cannot answer your questions as fully as they would deserve, but I read the *Handbook* with great attention. I admire the moral courage and the originality of the observation of this book, that will, I hope, be read by a wide circle of cultivated readers. I was especially impressed by the excellent description of the behavior of adolescents and children. The book is unique in several directions.

Very truly yours,

THEODOR REIK

Defendants' Exhibit 2, Annexed to Foregoing Affidavit

Feb. 17, 1963

Dear Mr. Ginzburg:

I have just finished reading "The Housewife's Handbook on Selective Promiscuity," which I think is a valuable contribution to the understanding of human behavior.

One may not agree with the author's philosophy about sex, one may even judge her quite an emotionally disturbed person, but one cannot quarrel with her honesty and humor. Far from being pornographic, this book should make each reader examine his own life more carefully. He may come out with opposite answers to those the author advocates but at least he will have done some thinking.

Sincerely,

LUCY FREEMAN

120 Central Park South
New York, 19

Defendants' Exhibit 3, Annexed to Foregoing Affidavit

1001 East First Street
Bloomington, Indiana
March 5, 1963

Mr. Ralph Ginzburg
Editor and Publisher
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

In answer to your question concerning my opinion of the book by Rey Anthony, of which you are the publisher, I wish to state that I consider this to be a truly significant and valuable book. It constitutes an important record of personal life, particularly as regards its sexual aspects, in

Defendants' Exhibit 3

our contemporary society, revealing widespread conditions that are today far from adequately realized, much less taken into account as they should be, by those dealing either theoretically or practically with human welfare. If we refuse to see a situation we may allow evil to take over, and if we cannot speak to each other about it we will not know where to look for it. The matter is therefore one of grave concern to the entire public.

To suppress this book or penalize its publisher, especially on a criminal charge, by classing it as "hard-core pornography" would be to set a shocking precedent, that might have tragic consequences for freedom of expression and intellectual freedom in general in the United States. It would open the door to a type of authoritarian dictation over matters of psychology and sociology that would, in reaction, promote the growth of underground subversion. It would also tend to promote that unhealthy state of society in which it is a quite accepted practice for people to live according to quite different standards of morality than those which they profess.

The predominant use by the author, Rey Anthony, of autobiographical narrative rather than theoretical discussion (which is however close under the surface in most passages) makes the book all the more effective in getting the reader's attention, allowing him better to grasp the problems involved, and to come to conclusions concerning them. Admittedly, not a few of the incidents will be repellent to the reader. Their impact will thereby be greater and this is fortunate, for they are the ones which it is the most important for him to think about the significance of.

What constitutes "hard-core pornography" varies greatly with time, place and circumstance. The accepted feminine costumes of today would have been considered "hard-core pornography" in this country at the turn of the century, if worn in public. Similarly, in matters of expression in oral and written language, our mores have been

Defendants' Exhibit 3

greatly liberalized during the same period, so that although Rey Anthony's book might have been taken as "hard-core pornography" in 1900 that is certainly no longer the case today. So far as this book is concerned, that is because enough of the population has by this time come to realize the social value of the presentation of facts like those put forth by Mrs. Anthony. In other words, very few people in 1900 would have been prepared to take the book seriously and they would have merely been shocked or titillated by it, passing by its deeper meanings, whereas today its courageous factuality in regard to the experiences recounted serves the important function of making many readers seek ways of changing conditions for the better. Moreover, our notions of what constitutes better are also evolving, and should evolve, and a book as veracious as this offers considerable help in that evolution.

In my opinion, "hard-core pornography" attempts, through words, pictures or actions, to arouse sexual feelings in ways injurious to the society of the given time and place. It thus encourages sexual thoughts and actions that take an anti-social form. I should say that Rey Anthony's book is just the opposite in this respect, since its primary function is in service to society.

Yours sincerely,

Hermann J. Muller

HERMANN J. MULLER, Ph.D., D.Sc.,
winner of Nobel Prize in Physiology
and Medicine in 1946.

HJM:slh

P. S. If my statement or any part of it is used I do not wish to have my connection with Indiana University stated because the above deposition is being made by me as a private citizen, not as an employee of Indiana University, and I do not wish to have this University involved through what I have said.

Defendants' Exhibit 4, Annexed to Foregoing Affidavit

THOMAS E. RARDIN, M. D.

1975 Guilford Road

Columbus 21, Ohio

February 20, 1963

Ralph Ginzburg
Editor & Publisher
Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

In answer to your recent letter concerning my opinion on the propriety of The Housewife's Handbook on Selective Promiscuity, I am happy to give you the following statement.

I have been using this manual for several months in counseling patients having marital difficulties centered about their sexual behavior sphere. When this Handbook was first made available to the medical profession, I ordered several copies and have reordered several times. I have given this book to several professional colleagues of mine and I feel it a valuable addition to the library of every serious student of sexual physiology and psychology.

I do not consider this Handbook pornographic in any manner whatsoever, since it is a most carefully written and phrased document showing one individual's continuous process of developing insight and growth in the sphere of sexual behavior.

I am and have been a practicing physician (Doctor of Medicine) for 32 years, am a member in good standing of all local, state and national medical organizations pertaining to my specialty, which is family practice. I would recommend this book to all doctors of medicine engaged in marriage and other forms of family counseling.

Sincerely yours,

Thomas E. Rardin,

THOMAS E. RARDIN, M. D.

TER:tr

Defendants' Exhibit 5, Annexed to Foregoing Affidavit

HERBERT F. TRAPL, M. D.
109-10 Queens Boulevard
Forest Hills 75, New York
BOulevard 1-2774

Febr. 19th 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg,

Although I gained my M. D. in Prague, 1933, having graduated then from the Czech Charles University, I have brushed up my psychiatry in three years of attending the New York School of Psychiatry where Prof. Sandor Rado, M.D. has taught us the principles of understanding emotional disturbances and seeing in faulty sex practices their main source.

Hard core pornography, as measured by contemporary national standards, is the expression of lewdness, lasciviousness or obscenity by word or picture with the intention to arouse prurient sex feelings in immature or impotent persons.

The Handbook is certainly not hard core pornography as measured by contemporary national standards as it represents a sincere description of selfanalytic observations to help those who suffer from the ill-effects of sexual immaturity, overcome their prudishness and free themselves from emotional cobwebs.

I wish I had the facilities to distribute this book to all my patients, who consult me about their marital and/or sexual problems. This frank and clean discussion of "unspeakable" and alas, so human and cardinal problems of everyone, will help many a sufferer to reach quicker a

Defendants' Exhibit 6

rich and healthy emotional life. Tension is the result of conflicts and orgasmic intercourse the master-mechanism to release tension.

Very sincerely yours

H. F. TRAPL.

Defendants' Exhibit 6, Annexed to Foregoing Affidavit

(Letterhead of)

PETER G. BENNETT, M. D.

February 13, 1963

Mr. Ralph Ginzburg
110 West 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg:

I have just finished Rey Anthony's *The Housewife's Handbook on Selective Promiscuity*, and let me tell you that it is a most impressive book and one that I shall long remember and frequently refer to in my work as a psychoanalyst. Indeed, I have enclosed a note to Mrs. Anthony, which I trust you will forward, simply to express my appreciation and congratulations.

It seems very important to me that the Postmaster General has chosen to prosecute you for using the mails for such a significant work, because it seems crystal clear that in this book there is no pornographic intent or obscene quality. Perhaps with such a clear issue we can see that the conscience of the Postmaster General is relieved once and for all of the moral obligation, which the many letters he is receiving on obscenity, is creating.

As indicated above, I am a psychoanalyst and a member of the Philadelphia Psychoanalytic Institute, American Psychiatric Association and the Philadelphia County Psychi-

Defendants' Exhibit 6

atric Society. In addition to private practice, I am Psychiatric Consultant to Haverford College and an Instructor at the University of Pennsylvania School of Medicine in Psychiatry. However, I must add that I am writing you solely in my capacity as a private citizen, and that I am entirely adverse to the trend in our modern society which tends to treat psychiatrists as specially sanctified authorities in moral and legal questions. The great legal problems of our society can only be definitively solved by mature parents raising their children in such a fashion that there will be relatively less hostility and fear of sexuality, etc. Until the sickness of our society abates, I sorrowfully feel we are required to have certain legal restraints which protect society from the few but also are a burden for those who do not need restraining.

Returning to the question of pornography specifically, it would seem to me that "hard-core pornography by contemporary national standards" must be evaluated by two measures. First, there is the intent of the creator. This is not necessarily easy to determine, but if the intent is to communicate ideas or feelings, including sexual feelings, I would not consider this pornography. If the object is material gain for the creator through an appeal to the sexual curiosity and appetite, I would call this pornography. Obviously, by this standard many movies, comic books and paperback novels are pornographic since they are produced primarily to make money. I do not feel that this is an illegitimate business, but I do recognize that in a sick, repressed society such as ours, there may be a need for some regulation of this business, just as we need some controls over gambling and confidence rackets.

Pornography may also be evaluated in terms of its effectiveness in arousing sexual responses in the recipient. This varies tremendously, but in this regard, legal regulation need only be concerned with the protection of those

Defendants' Exhibit 6

persons who would be harmed by it, just as we only need laws against rape to protect women and children. Whom are we to protect against pornography, and what pornography is harmful? This is a difficult question, but it seems that many children and some adults have been so over-protected against the facts of sexual life that it would conceivably be upsetting and even might contribute to anti-social acting out if they were exposed to certain types of pornography. The types of pornography I have in mind are those which suggest that sex is bad, dirty, and that a sexual relationship is primarily a hostile attack of a man on a woman, or vice versa. (There is an even greater problem in our society with the encouragement of pure hostility of the Mickey Spillane type which goes largely unregulated.)

The *Handbook* is clearly not pornography by the standards I have attempted to define above. It is very much an attempt to communicate some deeply felt ideas about female sexuality. I happen to agree with most of these ideas, but that is not even the point since if I totally disagreed this would not negate the fact that the author has ideas to express and the right to be heard providing she is not grossly harming any of her potential audience. Clearly the author was not primarily concerned with financial gain or fame, since the most she could expect was notoriety. Finally, even if the potential audience included many children I do not see how it could be particularly harmful, whereas for the majority of readers who understand its message at all, it should have a profoundly maturing influence that should make life more meaningful and enjoyable. The author makes it abundantly clear that her inability to find a good husband for herself and father for her children has made her life almost unbearably difficult at times, and we feel sorry for her, and are glad that she has been able to achieve the happiness she has. Nowhere does she encourage prom-

Defendants' Exhibit 6

iscuity at another person's expense, and occasionally she finds slight evidence that it has been helpful to the men and women she has crossed paths with. This is the only criticism that I can imagine a relatively mature adult leveling at the book; that she encouraged marital infidelity and irresponsibility, but this would require a gross misreading of the book. Certainly she uses no new words and describes no new scenes which have not been described in "mailable" literature before.

My total reaction to the *Handbook* was admiration of the author, interest in the content of the book, and enthusiasm for the cause of greater freedom of communication on the subject of sex which she espouses. I recognize that our society is not fully ready to accept the ideas, or in some cases even to read the words she uses, but it will be a better, saner society when it becomes ready. Therefore, I feel that Mrs. Anthony has made a real contribution to society, and I hope that this court case will not only preserve your right to send it through the mails, but that the attendant publicity will get this *Handbook*, the wider reading it deserves.

Very truly yours,

Peter G. Bennett, M. D.
PETER G. BENNETT, M. D.

Defendants' Exhibit 7, Annexed to Foregoing Affidavit

WALLACE C. ELLERBROEK, M. D., F.A.C.S.
Diplomate American Board of Surgery
427 Atlantic Avenue
Long Beach 12, California
Telephone HE 2-4473

Feb. 20, 1963

Mr. Ralph Ginzburg,
% Documentary Books, Inc.,
110 W. 40th St.,
New York 18, New York.

Dear Mr. Ginzburg:

Thank you for the extra copy of "The Housewife's Handbook of Selective Promiscuity"; I already have one copy which is used to loan to patients. I am a specialist in General Surgery, am a Diplomate of the American Board of Surgery, and a Fellow of the American College of Surgeons. I received my M. D. from the University of Iowa in 1944, and since have spent my time split between service in the Navy and in private practice.

My opinion as to the definition of hard-core pornography is as follows: a work which either by intent or coincidentally causes direct sexual stimulation, and which by inference might or might not lead to sexual activity.

It is my considered opinion after carefully re-reading the book that it does not, in whole or in part, in any way constitute "hard-core pornography". It is in no way salacious. As an additional test, I had the book reviewed by four young people, two male, and two female, known to me as of good moral character; they were instructed in advance to note any "sexual stimulation" of any type, and all reported none.

It is my opinion that the book has definite therapeutic value for individuals with sexual problems, and would be

Defendants' Exhibit 8

valuable rather than harmful to anyone who has reached physiological maturity. A further unsolicited opinion is that your other publications are superlative contributions, and will continue to receive my support and recommendation to others, both lay and professional.

Yours very truly,

Wallace C. Ellerbroek, M. D.
WALLACE C. ELLERBROEK, M. D.

WCE/we

Defendants' Exhibit 8, Annexed to Foregoing Affidavit

STANFORD R. GAMM, M. D.
664 N. Michigan Avenue
Superior 7-7480
Chicago 11 Ill.

March 5, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

1) I have an M. D. degree from the University of Illinois College of Medicine. I am currently a practicing psychiatrist and psychoanalyst, assistant professor of psychiatry at Northwestern University, attending psychiatrist at Veterans Administration Research Hospital in Chicago, attending psychiatrist at Michael Reese Hospital in Chicago, and clinical associate at Chicago Institute for Psychoanalysis.

2) To me "hard-core pornography" is easily identifiable as literature of low quality and poor taste, the sole purpose of which is to arouse the reader's sexual desires by any means the writer can invent without regard for literary value, ethical consideration, or total affectional and humanitarian regard.

Defendants' Exhibit 8

3) The Handbook (Housewife's Handbook on Selective Promiscuity, by Rey Anthony) is, in my opinion, not in the least obscene or pornographic. It is simply a woman's autobiographical account of her sexual and affectional life and development from childhood to adulthood, told in a straight forward, unashamed, refreshingly frank manner. I would let my daughters read it without any qualms that "they might be corrupted." Actually, it is my impression that we need more candor about sex, resulting in less emphasis and more equanimity, putting it in its proper place as an important function in life that has highly significant meaning in the total context of one's whole emotional experience. In the last analysis, my thought is simply—"What's all the fuss about?"

4) Partly answered above. Although no great example of literature and not written with any great insight into human behavior, the Handbook does help free us from the "prudish chains" that continue to bind too many American families. In fact, I suspect that such attitudes contribute significantly to the abundant fund of neurotic disturbance in our lives.

Sincerely yours,

Stanford R. Gamm, M. D.
STANFORD R. GAMM, M. D.

SRG/ag

Defendants' Exhibit 9, Annexed to Foregoing Affidavit

WILLIAM L. PURCELL—Librarian of Wistar Institute of Anatomy and Biology, Member of Contributing Staff of "American Record Guide."

Subject: "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony.

"Hard-core pornography" applied to a medium of communication means that its purpose and/or result are to arouse sexual desire in the reader or beholder. "The Housewife's Handbook on Selective Promiscuity" does not fall into this category because it does not dwell on sensual details for the simple reason that it is a book of ideas, a work of ethical philosophy, in the form of a sexual autobiography. So that even the most obtuse or careless reader will not miss the point, these ideas are explicitly formulated in the final chapter. If the purpose of the book were to stimulate the reader's passion, the sexual narrative would be enlarged and handled differently than it is, all unorthodox ideas would be eschewed, and the author would profess conventional standards in a final word of recantation. As the book stands, no author or publisher in their right senses would issue it as pornography to make money.

"The Housewife's Handbook . . ." is undoubtedly a classic and ranks with the Kinsey Reports as one of the half-dozen greatest contributions to our understanding of the psychology of sex made so far in this century. It is a book wrought with literary skill and is profound, sincere and original in its impact; it is courageous and eloquent and high-minded, witty and wise and honest. Like all living and truthful manifestations of the human spirit, this book is a force for morality, for the advancement of goodness and dignity. As an expression of secret thoughts and feelings common to many people but usually repressed, it serves a salutary function of catharsis. For the "average" man it is informative and instructive in an area of knowledge vital to the happiness of each individual but usually

Defendants' Exhibit 10

ignored by our system of education. Always entertaining and easy to read, it has the rare distinction of never being dull in spite of its serious intent; it holds the interest and amuses while it instructs and challenges thought. This book is one of those golden books of spirit and sense that, as Swinburne wrote of "Mlle. de Maupin" is a "holy writ of beauty . . . where man may breathe just for a breathing-space and feel his soul burn as an altar fire to the unknown god of unachieved desire."

Defendants' Exhibit 10, Annexed to Foregoing Affidavit

W. G. PARSEL, M. D.
1862 Placentia Avenue
Costa Mesa, California
LIberty 8-7601
LIberty 8-0881

February 19, 1963

Eros Magazine, Inc.
110 W. 40th St.
New York 18, New York

Attention: Mr. Ralph Ginzburg

Dear Mr. Ginzburg:

In reply to the four questions asked in your letter enclosed with Handbook I would like to reply as follows:

1. Degrees—Bachelor of Science Ohio State University 1950; M. D. Ohio State University 1954. Member of American Medical Association, California Medical Association, Orange County Medical Association, American Academy of General Practice, Aero-Medical Association, staff member Hoag Memorial Hospital, Newport Beach, 8 years of general practice.

Defendants' Exhibit 10

2. An exact answer to this question seems extremely difficult to me. After considerable thought and noting several dictionary definitions of pornography, I still have a great deal of difficulty in rendering a mere opinion. I can only venture to say that apparently most people would consider hardcore pornography something which would initiate a sexual stimulus but also would be of a crude, foul, or disgusting nature. The two concepts seem to me to be somewhat mutually exclusive so not really very satisfactory. I feel that if a person thinks that sex is obscene, than the fault is with the person. Perhaps there is no such thing as "pornography". In short I find it impossible to be dogmatic.

3. This question hinges on the reply to question 2, of course. I have no doubt that certain parts of this book, particularly where the author relates her sexual experiences, would arouse in the reader a sexual stimulus. As to whether this is crude or disgusting is something else again. Most of the book, however, would cause the reader to seriously reflect upon the philosophical and psychological points ventured by the author. In any event I can't consider the book "hardcore pornography" in the sense that most people would define this term.

4. This I think is the most pertinent question. I definitely think that this book is of considerable value to society. This book attempts to communicate what one persons idea of an ideal sexual relationship should be. Comprehensive, sincere, statements by individuals on this subject are desperately needed to counteract the mass of misinformation which is frequently given to the public.

Sincerely yours,

W. G. Parsel, M. D.

W. G. PARSEL, M. D.

Defendants' Exhibit 11, Annexed to Foregoing Affidavit

1835 Eye St., N. W.
Washington 6, D. C.

February 5, 1963

Mr. Ralph Ginzburg
Eros
110 W. 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg:

It has been called to my attention that your publication, *The Housewife's Handbook* has been challenged by the Post Office Department.

I have carefully read this book and would like to go on record, as a person of long experience as a marriage counselor and family life educator and as a psychotherapist who has dealt with many kinds of problems in the field of sexual behavior, in protest against banning of your publication and in support of the therapeutic and educational value of the book. The American public obviously needs such frank, clear, and penetrating accounts of sexual behavior if we are ever to overcome fallacious and prurient conditioning about sex which is still so rampant in our society.

Sincerely yours,

Robert A. Harper
ROBERT A. HARPER, PH.D.

Defendants' Exhibit 12, Annexed to Foregoing Affidavit

P. O. Box 581
West Lafayette, Indiana

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have read *THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY* by Rey Anthony and I am happy to write to you giving my opinion of this excellent work.

My qualifications are as follows: I have a B.A. (University of Houston), M.A. (State University of Iowa), and an M.S. (Purdue University). At the moment I am Chief Research Psychologist for the HUMAN RELATIONS RESEARCH FUND while completing my dissertation for the Ph.D. degree in Clinical Psychology. I am a member of the following professional organizations: American Psychological Association, American Personnel and Guidance Association, Midwestern Psychological Association, American Speech and Hearing Association, American Association of University Professors, American Association for the Advancement of Science, American Academy of Political and Social Science, and the National Honorary Scientific Society of Sigma XI. I am listed in the 10th edition of *AMERICAN MEN OF SCIENCE*.

Now to answer your questions in order. The above mentioned book cannot in any sense be considered to be hard-core pornography on the basis of contemporary national standards. In point of fact it is more in the nature of a scientific thesis of one woman's observation and unique introspection of her basic sexual nature; her problems, frustrations, and eventual resolutions of her *own* personal problems. The writer is not promiscuous—the book is cer-

Defendants' Exhibit 12

tainly not promiscuous. To label this book—which I'm certain will become a basic classic in understanding female sexual needs—obscene is to border on the ridiculous.

The unique value of this book lies in its honesty and rarity. To anyone familiar with psychological literature it is apparent that there is little, if any, material of an introspective nature with regard to the sexual nature of the female—or the male, for that matter. Material such as Mrs. Anthony places in her book can form the nuclei of a great many scientific experiments that could provide useful answers to many questions.

I assume that any intelligent person reading this book would recognize its value as an educational instrument so I will not belabor this point. In closing I would like to mention its value to other women. Through her writing style, Mrs. Anthony has created a warm and personal document that brings information and a high degree of comfort to women with similar problems.

I do wish you success in your court case Mr. Ginzburg. Since I am also a member of American Civil Liberties Union, you can easily guess which team I shall cheer.

Sincerely yours,

Prentice von Conrad

PRENTICE VON CONRAD
Chief Research Psychologist
HUMAN RELATIONS RESEARCH FUND

PvC:em

Defendants' Exhibit 13, Annexed to Foregoing Affidavit

CHARLES G. McCORMICK, ED. D.
Forty Park Avenue
New York 16, N. Y.

ORegon 9-3736

February 23, 1963

Mr. Ralph Ginzburg,
% Documentary Books, Inc.,
110 West 40th Street,
New York 18, New York.

Dear Mr. Ginzburg:

In response to your letter, I take pleasure in commenting on several items related to *The Housewife's Handbook on Selective Promiscuity*.

By way of introduction, I am a psychologist, certified in both the State of California and New York State. I hold a doctor of Education degree from Columbia University, a Bachelor of Divinity degree from Union Theological Seminary, and a Bachelor of Arts degree from Amherst College. For the past sixteen years I have been a lecturer in psychology at the New School for Social Research in New York City. I am in private practice at the above address, specializing in psychotherapy. I am a member of the American Psychological Association, the New York State Psychological Association, and a Fellow of the American Group Psychotherapy Association. I am also on the editorial board of the *International Journal of Group Psychotherapy*.

"Pornography", in my judgment, is an attitude. It is an attitude of "advantage-taking", colored by emotional deprivation. Pornography exists where the user's limitations permit another person to excite his appetite for "pleasure", without responsibility. Pornography requires

Defendants' Exhibit 13

a combination of elements in the consumer's or distributor's attitude: 1) The object or act must be intrinsically "bad" or "evil" *to him*; 2) it must be pleasurable; 3) it must be important to him to deny any identification with the object or act. Pornography exists only for one who is essentially ashamed and apologetic for his biological inheritance and function.

No material, whether book, picture, sound or act, is in itself pornographic. The conditions of the parties engaged in the exchange create pornography. I have a vivid recollection of a scene where I was a third witness. The other two were a couple of truckmen who were unloading a truck. I was on my way to school, junior high school. We three were audience to the mating of two cats. One of the truckers started to snicker suggestively, condescendingly. The other spoke sharply, "Don't laugh! That's just as sacred to them as it is to you when you do it." The second man, even though he reproved his companion, was obviously enjoying watching the cats experience coitus.

This was my first contact with both pornography and an attitude towards sex that declared it good and enjoyable. The attitude of the first trucker was pornographic. That of the second was more intelligent and adult. Even at the age of twelve I appreciated the difference.

My good fortune in sex appreciation as distinguished from pornography, which is sex depreciation, continued. In high school I studied with Jesuit priests. I am not a Roman Catholic. During a religious Retreat, one of the Jesuits was explaining about reading literature in which there were references to sex, e. g., Shakespeare's plays and sonnets. His explanation went like this: "When you read about a bucolic scene, you will experience sensations related to the texture of grass, the heat of the sun, and the smells of the farmlands. When you read about sex, you must expect to have sensations through your body that

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are associated with genital excitement. These feelings do not mean that the writing is "bad" or "dirty"; and they do not mean that you are "sinful".

Again, here was expressed respect for sexual experience, and sexual pleasure. The difference from pornography was clear and unmistakable. Sex could be enjoyed through a variety of media. It could be debased in any one of them only by the attitude of the participant or participants. While Shakespeare was not himself pornographic, a reader, or a member of his audience might be.

A nine-year-old girl reported to her mother that the teacher had that morning been showing "dirty" pictures to the class. The hysterical mother realized that she had unwittingly educated her child to pornography when she saw the colored slides of the circulatory and respiratory systems. These were the "dirty" pictures. To her daughter, anything pertaining to the human body, below the chin, was "dirty".

The trucker who snickered, the reader of Shakespeare who "drooled", and the little girl who saw "dirty" pictures among the blood vessels all measure *down* to the contemporary standard of "hard-core pornography". Their emotional conditions made this possible.

What is most significant about pornography is, that nobody can ever succeed in "protecting" such people from exposure to "pornography". Wherever they are, there is pornography.

It must be obvious to you by now that in my judgment neither the *Handbook*, nor any other material related to sex can in and of itself constitute pornography. Only to an individual, or to a particular group of individuals under leadership, could such matter become pornographic. Material related to the subject of sex, sexual expression, sexual experience, sexual education, and sexual enjoyment will be healthy or pornographic according to the condition

Defendants' Exhibit 13

of the consumer or of the distributor—and not necessarily to both in the same instance!

I have encountered no pornography in connection with the *Housewife's Handbook on Selective Promiscuity*; neither in the book itself, nor in the promotional material issued by the publisher.

I find the *Handbook* promising as a resource. For anyone who is consciously searching for an understanding of himself or of herself, the experience of this young author should be most helpful in several ways.

1) The universalization of the problems connected with the discovery of genital expression, function, and enjoyment is probably the outstanding service performed by the *Handbook*. The fact that someone else demonstrates first-hand acquaintanceship with what the reader has been through, relieves the reader of the sense of being "different", "peculiar".

2) The fact that someone has investigated a division of knowledge usually fraught with superstition, taboo, and "danger" (the danger associated with getting "caught" by one's parents), and that that someone speaks with confidence and self-respect, should serve to discharge the "magic" and awesomeness of this crucial matter.

3) The soundness of the author's discoveries is another value. The physiological information, the emotional encumbrances (claims), the psychological dimensions, and the cultural implications of all matters sexual are well established, and conscientiously recorded. The reader is exposed to information in a form easily understood. The author writes authoritatively. She knows what she is talking about, and is learning more.

For the psychologist, or psychotherapeutically trained psychiatrist, the book offers an interesting side-note. The author's marital history demonstrates the psycho-dynamic handicap which has accrued to her from her developmental

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period. In spite of her intelligence and her persistent pursuit of knowledge and competence in a great variety of fields, over and over again she allied herself with "good" but inappropriate partners. In writing her book she does exactly the same thing. One example of it is in her use of "authorities" in the second section of the *Handbook*: Her reference to, and use of quotations from Robert Lindner's book are not in keeping with the tone and attitude she herself expresses in her own writing.

I can see countless possibilities for constructive use of this unusual document. I should like to see it remain available to a learning public.

Yours sincerely,

Charles G. McCormick.
CHARLES G. MCCORMICK.

Defendants' Exhibit 14, Annexed to Foregoing Affidavit

DR. EUGENE B. NADLER
Department of Management
Case Institute of Technology
10900 Euclid Avenue
Cleveland 6, Ohio

February 14, 1963.

Mr. Ralph Ginsberg
c/o Documentary Books
110 West 40th Street
New York 18, New York

Dear Mr. Ginsberg,

I am writing to you in response to your appeal which came with *The Housewife's Handbook on Selective Pro-miscuity*, by Rey Anthony.

I hold B. S., M. A., and Ph. D. degrees in psychology, all attained at Western Reserve University. I began work

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as a professional psychologist, in clinical, research, and teaching capacities, several years before acquiring my Ph. D, six years ago. I consider that my specialty is the topic of social attitudes, within the area of social psychology, although I have done research and published professional articles on a variety of topics.

You may be particularly interested in one of these papers, entitled "Authoritarian attitudes toward women and their correlates," which appeared in the *Journal of Social Psychology*, 1959, pp. 113-123, 49. Dr. William R. Morrow was junior author of the paper. In this paper we presented evidence showing that the more chivalrous a man was, as measured by an attitude scale, the more likely it also was that he harbored hostile attitudes toward women, also measured by an attitude scale. It was further shown that both of these attitudes, usually thought to be opposites, were part of a world view that included prejudice toward minority groups and more general anti-democratic attitudes. The meaning of these results are briefly discussed, including chivalry and hostility in sexual matters. You may be interested to know that in doing this study, which was my master's thesis, I had very little previous information to go on, since there is a dearth of literature on this topic, a dearth which Mrs. Anthony's book helps, however slightly, to rectify. You also may be interested to know that this dearth of scholarly literature on the topic of male-female attitudes was balanced only by the enormous popular interest which this paper aroused. The local morning paper, the Cleveland Plain Dealer, gave it a great deal of space. It was picked up by a wire service, United Press I believe, and received coverage across the country. It was the subject of an article by a professional writer, John Gibson, in the Toronto Star. I have friends who tell me that this article produced news items overseas, even in the columns of a ship's newspaper. This enormous interest contrasts sharply with the merit of the

Defendants' Exhibit 14

research, which was simply a very modest scientific effort by a budding professional. It shows how much the public is starved for this kind of information. I enclose a reprint of the paper.

I would define hard-core pornography, by "contemporary national standards," as including any work specifically designed to sexually arouse a target population. There are a number of characteristics of the work that must be taken into account in order to make the decision that a work is of this nature.

1. Building to a climax. Hard-core pornography typically contains scenes in which one sexual act after another is graphically depicted, each more audacious than the previous one, the total coming to some wild climax.

2. Absence of non-sexual elements. The pornographer can't be bothered with how people make their living, the kinds of personalities they have, the problems of everyday living. To deal with these things distracts from his purpose of arousing his audience.

3. Corruption of the super ego. The phrase is Freud's, aptly pointing to the fact that part of the pornographer's job is to allay the feelings of guilt that he may arouse in his treatment of sex. This purpose is achieved by portraying the characters as completely devoid of guilt, chiefly, but also in other ways.

4. Gross exaggeration of the physical aspects of sex. The pornographer typically dwells on the huge organs of the male, the large breasts of the females, the amounts of sexual fluids extruded, etc.

5. Sexual virtuosity. The characters in pornographic works are invariably great lovers. They make no mistakes. They display no awkwardness. They have unlimited capacity for orgasm. They never get tired.

Defendants' Exhibit 14

I would say that if a work contains four out of these five characteristics, in any combination, then it is probably pornographic.

In my judgment, Mrs. Anthony's book is not pornographic. I don't believe there is a single scene in the book that has even one of the abovementioned characteristics, let alone four of them. Rather, it is an exceedingly honest statement of Mrs. Anthony's sexual development, and of the experiences which produced that development. The emphasis is not on how a person produces sexual experience, but rather on how sexual experience produces a person, and there is a world of difference between these two emphases. Mrs. Anthony has had many sexual experiences, some of them good, many of them unfortunate. Taken together, she seems to feel that they made her a better person. She has made a great effort to sort out these experiences and to put them before us with her own interpretation so that perhaps we may benefit thereby. I don't believe that her experiences are very atypical of the general population, but I do believe that her honesty and insight is.

I believe that this book, if widely read and discussed, would be of positive value to society. It raises a great many questions that can be pursued as scientific hypotheses. It contains many opinions which are widely held by the most advanced sections of the scientific community. It takes a question momentous for us all out of the limbo of silence and places it on the table for open discussion. It is possible to disagree with certain sections of it, and to wonder at the many questions it doesn't deal with at all. But it is not possible to remain unaffected by it. I would like to see more books by Mrs. Anthony. She manages to do

Defendants' Exhibit 15

what every teacher aspires to, namely, to stretch the minds of her students.

Sincerely yours,

Eugene B. Nadler, Ph. D.

EUGENE B. NADLER, PH. D.

Assistant Professor.

Defendants' Exhibit 15, Annexed to Foregoing Affidavit

ABRAHAM J. ROSENFELD, M. D.

Stafford House

5555 Wissahickon Avenue

Germantown, Philadelphia 44, Pa.

Victor 3-6670

February 19, 1963

Mr. Ralph Ginsburg
Editor and Publisher
c/o Eros Magazine, Inc.
110 West 40th Street
New York, New York

Dear Mr. Ginsburg:

I will attempt to answer certain questions asked by you concerning my opinion and reactions, specifically those relating to obscenity and pornography of the book, "The Housewife's Handbook on Selective Promiscuity."

I am not a lawyer and am not acquainted with the State or Federal statutes regarding obscenity and pornography. I am an active practicing physician, having begun my practice in 1935, following four years of medical school and two years of internship. I have attended almost yearly post-graduate courses and for the past fifteen years, have limited my practice to the treatment of those diseases requiring the use of Steroids. I am also certified as an Internist and Cardiologist as well as Rheumatologist.

Defendants' Exhibit 15

The use of Steroids in the treatment of Arthritis requires a detailed study of male and female endocrinology. The word STEROID means "like-unto sex hormones." The suffix "oid" means "like unto." Sterones are sex hormones; Estrone—female hormone, and Testosterone—male hormone. Because of my knowledge of this hitherto little-known subject, I have treated many couples and individuals with pre-marital and marital counselling.

I found no sense of obscenity or pornography, not even the minuteness glimmer of same within the handbook. The book under question can be regarded as a mirror reflection, the attitudes, many subconscious, and measures the emotional arrest of the person reading same. What about the book is obscene? The use of certain words which are all, in content, in good taste. Certain parts of the body do have names, eg. Vulva, clitoris, breasts, nipples, and when used in content, should excite no unusual curiosity. Certain verbs which describe an act, such as Fuck, screw, kiss, menstruate, must be used in content, and certainly are not placed in the sentence for pornographic effect.

From the point of view of social acceptance, one may question the "good taste" of describing the frequency and pleasures of extra-marital relationships, but certainly there is nothing obscene or pornographic about same.

Lady Chatterly's Lover is a delightful unrealistic novel concerning extra-marital relations, and the pleasures induced thereby. The book is certainly not obscene or pornographic. Even if one reads between the lines of the implied act of "ano penetrato," and the values derived thereby, it does not make it obscene or pornographic.

I believe the ultimate value lies within the reader, and in my case, it is "good or bad" taste. I believe Henry Miller is in bad taste, and I do not enjoy his personal versions of sex. No one forces a person to read and a book cannot be rammed through the visual parts unto the intellectual conception zone. It must be a voluntary act.

Defendants' Exhibit 15

I believe the Post Master General and his representatives deprive me of my inalienable rights, guaranteed by the Constitution, when he opposes his personal standards of obscenity and pornography to mine. He tells me that my standards are not to be trusted and he will exercise his standards to protect me. I resent this interference with my rights to exercise my own judgment.

I have seen obscene and pornographic material published and distributed with only one purpose in mind—to stimulate any erogenous sex feelings one may have. These include “French” pictures and movies (although most are made in the U. S. A.), showing the sex act in all its combinations, many wierd and impossible; “Midnight Intimacies”; and “Memoirs of Josephine Mutzerbocher.” These I consider obscene and in very bad taste, but I can quote passages in the Bible just as descriptive of obscene sex acts. I can also quote beautiful descriptions of sexual intimacy from the Bible. eg. “Song of Song”, but in very good taste.

Photographic nudes may cross State lines, but not if pubic hair is shown. If the nudes are painted in oils with or without pubic hair, there is no barrier to State lines.

I do not know what is meant by “hard-core pornography;” I only know what appeals to me. I do not believe it is possible to define “hard-core pornography.” If it is detrimental to public morality, then I believe this should be defined, in order to detect deviations.

Certainly, the “Handbook” could only be considered pornographic by one with unnatural sex emotions and usually extremely immature.

The intent of the author is important. Was this written to be pornography? By what stretch of the imagination can any part of the Handbook be said to have been written with this in mind. The same rule can be applied to any passage in and out of content, and pornography cannot be found.

Defendants' Exhibit 15

I believe this book is a good one and of inestimatable value to Society. To my knowledge, I know of at least thirty divorces which would have continued as successful marriages if the "Handbook" had been read by either one or both of the parties. I can recall several families, which if aware of the contents of this handbook, would not have been disrupted, but most likely would have developed a more solid foundation by removing feelings of guilt and inadequacy.

I hope you win your case. I also hope that the Handbook will stimulate many additional women to write honestly and truthfully, of their sex experiences, so that their manifold experiences may lead to broad conclusions to be used as guides in instructing the young of the present and next generation. Not only may juvenile sex delinquency show a marked decrease, but it is possible, the more numerous adult sex delinquents may show some beneficial effects.

I wish you a decisive victory and trust that this communication will be of some benefit towards the successful conclusion of your case.

Respectfully,

Abraham J. Rosenfeld

ABRAHAM J. ROSENFELD, M. D.

Defendants' Exhibit 16, Annexed to Foregoing Affidavit

UNIVERSITY OF CINCINNATI
Testing and Counseling Center
Cincinnati 21, Ohio

EVALUATION OF
THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY

1. Professional Background:

A. Degrees:

1. B.A. Degree, Boston University, 1953
Major: Psychology
Minors: Sociology, Philosophy
2. M.A. Degree, University of Maryland, 1956
Major: Counseling Psychology
Minor: Industrial Psychology
3. Ph.D. Degree, University of Maryland, 1957
Major: Counseling Psychology
Minor: Industrial Psychology

B. Certification and Professional Organizations:
Certified Psychologist, State of Maryland—Inactive
Status

Member—American Psychological Association
Member—Division 17, Counseling—A.P.A.
Member—Eastern Psychological Association
Member—Cincinnati Psychological Association
Member—Sigma Xi

C. Employment:

Pre-Ph.D.—Equivalent of two years full-time as a
trainee in Counseling Psychology with the Vet-
erans Administration Hospital, Perry Point,
Maryland

Duties: Vocational-Educational Counseling, Psycho-
therapy, Diagnostic Evaluation

Defendants' Exhibit 16

Post—Ph.D.—Two years—Clinical Psychologist, Veterans Administration, continuing above duties.
 Three and one-half years—Chief Counselor and Assistant Professor of Psychology, University of Cincinnati

Duties: Counseling and Psychotherapy with college students as well as occasional children and adults.

Teaching:

- a) "Counseling and Psychotherapy"—3½ years
- b) "Psychology of Personality"—1 semester
- c) "Introductory Psychology"—3½ years
- d) Practicum Supervision—2 years

2. As Drs. Ebehard and Phyllis Kronhausen state in their book "Pornography and the Law", it is difficult to describe in words the major differences between erotic realism and "hard core" pornography, yet when one sees them side by side, they are easily distinguishable. Choice of words, pictures, length of material, subject matter (e.g., perversion) are certainly not appropriate criteria. Nor is emotional response, since a prerequisite of normal sex is physical and emotional responsiveness. Intent is the most frequently applied legal criteria and, as I understand the Supreme Court's decision, a judgment must be made whether or not the book was intended solely as "dirt for dirt's sake" with no other purpose or value to society in mind. It is, of course, impossible to read the author's mind in this matter and each of us must set up some of our criteria. If it is important to society (a debatable point) that we eliminate books which are written for "dirt's sake", then we must do all possible to preserve those which are not so.

Defendants' Exhibit 16

As I read a book to make this judgment, I apply several mental criteria. 1) Did the author use a "four letter" word when a more acceptable word would have conveyed the four letter vernacular. For example, in Henry Miller's book "Tropic of Cancer" the word "vagina" could never communicate the contempt in which he held women as did the four letter vernacular. Also, the vernacular is the common, accepted vocabulary to many groups of people (which, unfortunately, includes many children since parents frequently refrain from teaching them proper terminology), and for an author to place more "high level words" in their mouths is unrealistic. So point one is "did the author have to use the word he did to convey his message?" 2) How lavishly does the author describe his sexual scenes? In "hard core" pornography the author typically goes into considerable minute detail in describing the performance of the characters. Many times the fantasy includes acts and actions which are physically and anatomically impossible. For example, impossible sexual positions, exaggerated sex organs or behavior of such organs, etc. To the educated, these actions lost their eroticism by the very nature of their absurdity. 3) Every sexual performance brings supreme ecstasy, even to the victim who initially may show fear but is soon won over. Sex is good, but it is not always quite as good under all conditions as these authors would have us believe. 4) Is the book dull? Not very scientific, I'll admit, but frequently a very appropriate final criteria.

Again, I agree with Drs. Ebehard and Phyllis Kronhausen that "contemporary national standards" are so broad that they make a meaningless criterion. In my evaluation presented below, I shall be primarily concerned with whether or not the book is a) "dirt for dirt's sake"; b) consistent with my above criteria; and c) of any other value to society.

3. By either my above standards or the Supreme Court's decision, I cannot consider this book pornographic. In the

Defendants' Exhibit 16

first place, the author's use of the vernacular seems entirely appropriate and reflects the important point that children quite frequently have no other vocabulary with which to deal with such matters. In reflecting her chronological growth the author immediately changes over to more appropriate vocabulary with occasional, appropriate return to more common language. Second, her descriptions of her sexual experiences are presented in detail but are not embellished or exaggerated. Furthermore, the acts and actions, described are even more limited than one might find in the sex history of many normal couples.

On the third point, the author is quite emphatic several times in the course of the text that some sexual experiences have a minor effect on her or none at all. There appears to be no attempt to suggest all sex acts are the height of ecstasy.

4. I believe this book has two definite basic values to society. First of all, I feel it is a very valuable case history to the student of sex behavior and to the counselor or therapist that must deal with sexual problems of patients. Since a good number of my clients are young women, many in the throes of dealing with their sexual feelings, I had felt I did not have too much to learn in this area, but Mrs. Anthony's book proved me wrong as I'm sure it will many other "experts".

Secondly, I definitely feel this book would be useful in "bibliotherapy" with certain clients who were ready to deal with their feelings at this level. Because of the lack of communication about sexual experience among women, I am always amazed at how little they know of the normality or abnormality of their feelings in this area. Men are frequently more fortunate since their discussions are usually much freer. An example of much feminine "ignorance" would be the number of girls I have seen who are convinced they are the only females who have ever masturbated. Mrs.

Defendants' Exhibit 17

Anthony's book could help considerably to alleviate resulting feelings of guilt in such cases.

I trust this opinion will be of value to you in facing your indictment. To summarize my impression: Not Pornographic.

Richard P. Walsh
RICHARD P. WALSH, PH.D.
Chief Counselor and
Assistant Professor of
Psychology

Defendants' Exhibit 17, Annexed to Foregoing Affidavit

SAMUEL BARON, PH. D
310 West 86th Street
New York 24, N. Y.
ENDicott 2-2891

March 6, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

I am a clinical psychologist and psychoanalyst.

Mrs. Anthony's book is a forthright, ingenuous account of the sexual development of a woman who, from early childhood on, showed a remarkable need to be completely honest with herself. Parents and educators, in their attempts to teach facts about life, would do well to emulate the freedom from that usual shame-faced inhibition which tends only to an evasion or an obfuscation of issues.

It is precisely this shame-facedness that lays the basis for obscenity from which the book is singularly free. The

Defendants' Exhibit 18

author uses the vernacular obviously only because that was the actual language in which sex was introduced to her. The word "coitus" is no less obscene than its vernacular equivalent just because a Latin facade tries to hide its meaning.

One of the greatest values of the book lies precisely in this wholesome tearing down of all false facades, and thus helping to establish a freedom from the crippling, stultifying constrictions that only make for mental illness and neuroses.

Sincerely yours,

Samuel Baron
SAMUEL BARON

Defendants' Exhibit 18, Annexed to Foregoing Affidavit

UNIVERSITY OF ILLINOIS LIBRARY
Urbana, Illinois

March 5, 1963

Mr. Ralph Ginzburg
Editor & Publisher
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have just completed reading Rey Anthony's *The Housewife's Handbook on Selective Promiscuity*, published by Documentary Books, Inc. I understand that the book was issued several years ago, but it had not previously come to my attention.

This is a book that Dr. Alfred Kinsey, Havelock Ellis, and Sigmund Freud would have thoroughly appreciated and for which they would have been grateful. The tragedies and joys of being a woman have never been more honestly stated, in straightforward, unpretentious, yet appealing

Defendants' Exhibit 19

language. One can only feel deep sympathy for the heroine of this autobiography as she seeks to understand her own nature and personality, and searches for happiness for herself and others. In my view, the book would be an extremely valuable document for every woman to read, to give her a better understanding of her own psychological problems, and for every man—especially every husband—to give him a clearer insight into feminine mentality. I believe that it could do much to dispel ignorance, bring about better adjustment between the sexes, and reduce marital unhappiness.

With best wishes,

Sincerely yours,

R. B. Downs
Dean of Library
R. B. DOWNS
Administration

RBD:RD

Defendants' Exhibit 19, Annexed to Foregoing Affidavit

HARRY BENJAMIN, M.D.
New York and San Francisco

December 31, 1962

Office Address:
44 East 67th Street
New York 21, New York
REgent 7-0770

Mr. Ralph Ginzburg
% EROS
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

In connection with your publication of "The Housewife's Handbook of Promiscuity", I would like to say that

Defendants' Exhibit 20

I know this "confession" and consider it a most valuable contribution to the science of sexology. I have also found it useful in certain cases of marriage counselling and would certainly welcome its publication as a hard-cover book.

Trusting that you will be successful in your plans, I am

Sincerely yours,

Harry Benjamin

HARRY BENJAMIN, M. D.

HB/va

Defendants' Exhibit 20, Annexed to Foregoing Affidavit

OREGON STATE UNIVERSITY
Corvallis, Oregon
School of Home Economics

February 26, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have your letter regarding the question of whether *The Housewife's Handbook of Selective Promiscuity* should be considered hard-core pornography. Of course the spelling out of what constitutes "hard-core pornography" would be different as different persons define it. From my point of view, having seen at various times in the course of my professional career what I have considered "hard-core pornography," I do not consider *The Housewife's Handbook of Selective Promiscuity* as such.

The book had come to my attention before I heard from you and I had purchased a copy of it for use with some of

Defendants' Exhibit 20

my students as they developed in their concepts to the point where I thought they could use it. I have been using it on a selective basis for the past year or so. I make a point of selectivity for the inhibitions which surround sex in our culture are so great that a thoroughly professional and objective discussion of almost any sex topic is upsetting to certain persons. I likewise use clinical materials in this way. I prefer therefore to use a book like *The Housewife's Handbook of Selective Promiscuity* in a selective manner rather than as a document made available to anyone. I do expect to continue to use it in my work however.

Perhaps as good a way as any to express my view is that I gave *The Handbook* to my daughter and her husband to read. Their comment was that it was helpful to them, as it gave them new insights into the sexual feelings of women. I feel that this is a central feature of the book and I'm quite satisfied with the fact that they read it.

The author herself is evidently a psychologically confused and I feel an unstable woman, but this so far as the "pornography" issue is concerned is beside the point. In fact, the book can give discerning readers new insights into the way in which sex may be integrated into a normal mature life. I don't believe either male or female could read the book with any objectivity and fail to get a clearer insight into what is involved in mutuality in the sexual relationship.

The section on communication has tremendously valuable insights and is made much more meaningful by the portion of the book which precedes it.

The "hard-core pornography" approach which features exaggerated size of genital organs, incest situations, violations and seductions to the exclusion of any educational point to be made is not found in this book. I feel that the Kronhausen's in their book *Pornography and the Law* have done a good job distinguishing between what is "hard-core pornography" and what is not. I'd like to recommend the definition in the Kronhausen book to all interested persons.

Defendants' Exhibit 20

I feel that this book should not be banned from the mails. If it is, it extends the definition of pornography to the point where almost any autobiographical or clinical material could fall under the same ban.

My background includes a Ph.D. from Teachers College, Columbia and some 35 years during which I have been dealing with sex education matters, and sexual problems as an aspect of the counseling and advisory work I have done.

I am also the author of the following books in this field:

1. *Sex Adjustments of Young Men*—Harpers 1940
2. *Sex Education as Human Relations*—Inor Publ. Co. 1950
3. *Premarital Intercourse and Interpersonal Relations*—Julian Press—1961.

I have also written the pamphlets, *Understanding Sex*, and *Understanding the Other Sex* for use in high schools, as well as a great many articles dealing with sexual matters. I also teach a seminar for graduate students entitled, "Psychosexual Development through the Family Cycle." I have also spoken frequently at such professional meetings as the Groves Conference on Marriage and the Family and the National Council on Family Relations. I was also one of the main speakers, talking on premarital sex standards at the North American Conference on Church and Family sponsored by the National Council of Churches in the U. S. A. and the Canadian Council of Churches in May, 1961.

Sincerely yours,

Lester A. Kirkendall
LESTER A. KIRKENDALL

LAK:ac

Defendants' Exhibit 21, Annexed to Foregoing Affidavit

W. A. BLACK, M. D.
916 5th Street — P. O. Box 390
Phone SHERWOOD 2-3247
Marysville, California

February 27, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

Thank you for sending me a copy of Rey Anthony's "THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY" for review and criticism. To begin with I think the title might better be "THE DIARY OF A NYMPHOMANIAC" or "REVELATIONS ON THE INTIMATE LIFE OF THE SEXUALLY IMPULSIVE AND UNRESTRAINED FEMALE."

This book presents a clear, candid, nonpornographic description of the unfoldment of sex activity in a rather uninhibited female. It is an excellent chronicle, intelligently written, and shows remarkable logic and scientific knowledge of the subject of SEX. In my opinion it should be a most valuable book for students of sociology. It vividly presents a reliable picture of sex expression in the aggressive, highly sexed type of woman when freed from the restraint of our social mores and taboos. As such I consider this book to be very valuable in its being reliably descriptive of a definite type of womanhood.

As a physician I find it most important to understand the basic pattern of people to properly treat their frustration produced neuroses. This book very cleverly presents such a pattern in its natural uninhibited expression. Further, the discussions given enable one to better approach the building of rapport.

Defendants' Exhibit 21

Insofar as pornography or obscenity are concerned I find that this treatise contains no element of these. It is an honest and frank narration of the life of a real person which may be expressive of the lives and thoughts of many women of this type. But before completely clearing it of any stigma of pornography I think it well to define what is meant by PORNOGRAPHY. At the outset I do not know what is meant by "hard-core" pornography other than just pornography. In my thinking the word pornography refers to the crude burlesquing of sexual activities and thought. I find none of this in this book. Rather, it brings to light in easily understood lay language many marital problems the solution of which is very important for domestic tranquility and marital understanding.

By way of supporting my right to comment as a physician I give the following synopsis of my training and experience. By profession I am a physician doing a general medical practice including obstetrics and surgery along with being a medical director for a large international corporation. I hold the degrees of AB (physics), MA (zoology), and a certificate of completion in education from the University of California in Berkeley. My M. D. was conferred by Washington University School of Medicine in St. Louis. I have also taken graduate work in the University of Southern California Graduate School of Medicine and in several European hospitals. I taught in the city school systems of both Los Angeles and San Francisco, served with the U. S. A. A. F. during World War II and headed a school for the 4AF, and worked for 20 years as a physician in 3 continents—Asia, Europe, and No. America. I have practiced in my present locality for the past 6 years, am a member of the local Methodist Church serving part of the time on its official board and have acted as leader for a youth discussion group. Further, I am the son of a Methodist minister and as such have long been interested in moral issues.

Defendants' Exhibit 22

In conclusion I wish to emphasize that this book is not pornographic, but it is rather a scholastic treatise on sex activity and philosophy. In style it is refreshingly frank without being smutty. It contains much constructive information, is technically correct, and offers a good study of the thoughts and behavior of a definite type of womanhood which appears in significant numbers. I recommend it as required reading for sociology, psychology, and divinity students, and also for study by married couples. I find no obscenity in the way the author has expressed this work, hence I can not understand why you or anyone else should be indicted for mailing this book.

Sincerely,

W. A. Black, M. D.

W. A. BLACK, M. D.

Defendants' Exhibit 22, Annexed to Foregoing Affidavit

WHITTIER COLLEGE
Whittier, California

Telephone Oxbow 3 - 0771

February 28, 1963

Mr. Ralph Ginzberg, Editor and Publisher
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I am pleased for the opportunity to respond to your request for an evaluation of *The Housewife's Handbook on Selective Promiscuity*. I am Associate Professor of Psychology here at Whittier College. I have a Ph.D degree in psychology from the University of Nebraska. I believe

Defendants' Exhibit 22

I reflect the opinion of many psychologists in matters related to pornography. Totally apart from freedom of the press, I am of the opinion that documentation of experiences and/or feelings related to sexual motivation has value both for clinical purposes and for an informed public. It is in this sense I feel qualified to speak rather than in the sense of artistic merit or literary achievement.

I do not believe that the *Handbook* qualifies as "hard-core pornography." It seems quite apparent to me that it's author did not write with the purpose of stimulating sexual interests. While I do not believe that the details of sexual experience can be considered typical of current standards of behavior as regards sexual morality, the book certainly does not represent values which are contrary to those contained in popular literature. Other examples of contemporary literature, widely available and therefore a part of mass communication media, are in my opinion closer to "hard-core pornography" in the sense that they serve to excite sexual interest (often by omission of details).

My concept of pornography is implicit in the above remarks. To make it more explicit, I would say that "hard-core" may be understood to mean a presentation of sexual materials in such a manner that they seek to excite sexual motivations rather than inform. Further these materials contain both in written and pictorial form, direct demonstrations of sexual acts which are contrary to contemporary moral code.

The *Handbook* according to my reading, presents sexual experiences which are often difficult to document because women find it offensive to discuss such experiences "in public." It therefore makes available in a way which is not true of other clinical or medical literature, reactions which contribute to our understanding of sexual motivation. These details of feeling are directly accessible to the public and can provide in private reading much would is

Defendants' Exhibit 23

hard to communicate in public conversation, even in a specifically clinical setting.

Sincerely,

Eugene E. Gloye
EUGENE E. GLOYE

Defendants' Exhibit 23, Annexed to Foregoing Affidavit

(Letterhead of)

State of California
Department of Mental Hygiene
METROPOLITAN STATE HOSPITAL
11400 Norwalk Blvd.
Norwalk, California

Psychology Department
February 28, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I am happy to reply to your request for an evaluation of the book "*The Housewife's Handbook on Selective Promiscuity*," by Mrs. Rey Anthony. I read the book in one sitting and found it exceedingly interesting.

The following is the data that you wanted concerning me and my evaluation of the book:

(1) I have a Bachelor's Degree in history from UCLA and an MA and Ph.D. in psychology from UCLA. I am a member of the American Psychological Association, the California State Psychological Association, Phi Delta

Defendants' Exhibit 23

Kappa (the National Professional Fraternity in Education), and I am a very active member in a local Unitarian Society and am also active in the Pacific Southwest District of the Unitarian Universalist Association; and have given talks before several Unitarian Universalist churches and/or fellowships in this area. On occasion I also speak before PTA's and other community organizations. I am employed as a Clinical Psychologist at Metropolitan State Hospital, Norwalk, California. Also, I have at times been an evening instructor in Psychology at East Los Angeles College.

(2) I find it very hard to answer the question of what by "contemporary national standards constitutes hard core pornography." Some possibilities present themselves:

(a) I have read some material in which obviously the author felt that sex was dirty and was trying to be very sexual, but I have also read material in which the person thought that sex was dirty and condemned it. I suppose both of these might be thought of as pornographic. I find the latter more objectionable than the former. For example, I have a book in my office called *The Way of God in Marriage* written by a Mrs. Mary E. Teats, who calls herself the "National Purity Evangelist of the Women's Christian Temperance Union and lecturer for the National Purity Association." This book was written in 1906 and is quite anti-sex, regarding it as dirty. If you want to call any book pornographic I would call this one that, because its effect on the sex lives of any who would be guided by it would be very deleterious. So, if we want to call any book which regards sex with guilt as being pornographic this is a possibility. However, I think we would have to be thorough-going with this definition.

Defendants' Exhibit 23

(b) Another possible definition would be one which regards sex as something totally apart from interpersonal relations and which describes sexual relations explicitly. If this is hard-core pornography then, I suppose, many sex manuals might be considered in the same category.

(c) I suppose what people are actually trying to do is to make sure that people, especially young people, don't find out that sex purely and simply can be a lot of fun and very enjoyable. I suppose if you wrote about a relationship in which the sensuous elements were described in considerable detail, and you took pains to say that the two people involved were legally married, that this would be objected to in the way of being pornographic.

I don't believe this handbook is hard-core pornography by any of the measures that I have mentioned above, except that it does imply that sex can be fun. It also, incidentally, demonstrates that under some circumstances it can be very much not fun. I think I can elucidate on this more fully below.

(3) The Value to Society of this Book. I consider the book the "*Housewife's Handbook of Selective Promiscuity*" exceedingly valuable to society. As a matter of fact, I would think that its impact might well be epic-making on our thinking. What Mrs. Rey has described is simply the sex life of a woman, along with those other parts of her living experiences which have contributed substantially to this. It is one segment of living, a major strand in the fabric of a life. To this is added in the second portion statements of her own philosophy. I regard this as socially valuable from two aspects:

First, from the point of view of its actual usefulness to professional and non-professional people. I, myself, am

Defendants' Exhibit 23

a psychologist who works almost exclusively with women. I am assigned to wards in which I conduct group therapy, give mental health lectures, and in other ways work with women who are in various stages of remission from mental illness. I deal with women who may be married or unmarried, divorced, separated, etc., and to many of them sexual matters are often of great importance, as ongoing adjustments which they must make to men with whom they relate, as they play their part as mothers of children, and as persons whose mental illness has been contributed to by sexual attitudes and sexual behavior which was part of their growing-up experiences. I have found this book exceedingly helpful to me (and this is after one reading without further mulling over and application of the book to my own experience in teaching and as a therapist), in gaining a greater understanding generally of female sexuality. Mrs. Anthony portrays in a way I have not seen portrayed before, the feelings, emotions and needs of a woman in the sexual sphere. This book has helped me to appreciate considerably more than I had before appreciated what the sexual aspirations of a woman may be. In a very real sense one of the most important features of this woman's story is her failure to achieve a long lasting, economically sound, and satisfying interpersonal and sexual relationship with a male, in spite of many attempts.

The folklore would have us believe that women, following marriage, achieve satisfactory communion with their mates, including regular, frequent and satisfying sexual intercourse in the traditional position, with simultaneous orgasms; and that this continues throughout marriage. Those of us who work with people's problems and even those of us who do not, but have spoken frankly with our friends about such matters, recognize that the picture the folklore presents is nonsense and tragic nonsense at that. I am sure that failure to achieve the ideal relationship is far more often the rule than the exception, and that Mrs.

Defendants' Exhibit 23

Anthony is not a particularly deviant individual, but a relatively normal woman as women (and men for that matter) go in our culture. She is, in fact, possibly healthier than some because she refuses a life that is merely half living, and instead of "adjusting" her life to a bad relationship, insists that she as a person is entitled to sexual fulfillment.

Mrs. Anthony shows in her book the contribution of many, many factors to the satisfyingness or lack of satisfyingness of a sexual experience. She shows how economic factors, the presence of children and their activities, pregnancy, the tensions surrounding it and the fear of it, contribute to or detract from happy sexual relations. She shows how the exigencies of the marriage relationship may affect the quality of a sexual relationship. She shows how her own attitudes affect her sexual fulfillment. Most of all, however, she shows the very crucial influence of masculine attitudes and behavior upon the sexual fulfillment of a woman.

I do not mean to say that I was unaware of these matters before, but the book has given me a renewed appreciation of the woman's part in them. It has also brought to light the fact that I had suspected, but never fully appreciated, which is that the female remains a sexual being in spite of rebuffs and unsatisfactory situations and lack of fulfillment of her sexuality; and, if given a chance, will continue to strive for fulfillment.

The importance of the clitoris in the female sexual experience is stressed; I feel this book is part of a continuing debate among sexologists, male and female, as to what parts of the female anatomy are the source of female sexual satisfaction, and under what circumstances—a debate, which, in my opinion, may have the outcome of helping women in general achieve greater sexual fulfillment.

In the second place, I see this book as being socially valuable because it contains an enormous and very pro-

Defendants' Exhibit 23

found social message. There are, in fact, two messages interwoven.

The first message is that if we are ever to make progress in sexuality, sex must be talked about explicitly and in detail, including feelings and sensations which are part of the experience. It is apparent from the experiences Mrs. Rey relates and puts into this book that much of the difficulty she encountered was a result simply of people not knowing about sex and therefore of their operating on prejudices, because sex and sexual experiences had not been talked about. A major burden of this work is that sexual experiences can and ought to be talked about, and talked about, as well as written about in whatever language one chooses, and however one wishes to express it. Patently, this is the only way that we can bring sex out into the open and make it a socially useful part of our human experience.

The second message is essentially a plea for society's tolerance of variations and experimentation in the realm of sexuality. Mrs. Rey is saying that if we are ever to discover what sexual fulfillment means, we must rid ourselves of the prejudice that there is one particular conventionalized way of carrying on sexual relations, and that anything else is evil. Mrs. Rey rightfully and realistically indicates that such experimentations are not necessarily always fulfilling, but she does make a strong argument for the concept that there must be tolerance for doing things in somewhat different ways outside of the conventional framework if we are ever to solve the enormous sexual problems to which our society is heir, and discover what is best in the long run for people. Inasmuch as we are already engaged on every hand in all kinds of interpersonal experimentations, including the sexual—whether legally or illegally—I would strongly support Mrs. Rey's implicit doctrine and suggest that we ought to recognize

Defendants' Exhibit 23

that the last thing has not been said about sexuality and that much more needs to be done and thought about and talked about concerning sexual functions and sexual needs.

I see that Mrs. Rey may be, especially if she identifies herself and desires it, a part of a crusade in a tradition of Susan B. Anthony, Margaret Sanger, and many other women in the past who are involved in a cause related to the welfare of her sex. This time the cause would be that of a sane view of sex and the toleration of an honest and open approach to it, a cause which I for one would firmly support.

In short, I find Mrs. Rey's book an extremely valuable book. I should like to recommend it, for example, to the people in my church to read, especially those who are having marital difficulties, in order to increase their tolerance and understanding for one another. Much of the book, I should think, would be very suitable reading, for teen age people, especially teen age young women who could empathize strongly with the growing up period that Mrs. Rey relates, and could read on and be disabused of some of the unrealistic notions about marriage and sexual experiences. I should think this would make very good reading for the average man to help him gain a better appreciation of female sexuality.

I hope, Mr. Ginzburg, that I will not need to be called upon again to comment upon a book for the purpose for which you are asking these remarks, although I am perfectly willing to do so. If what I have written or material like it is used in court, then I object in principle to what is implied by this, although under the circumstances you may use what I write, of course. In a sense, I am being part of a large board of censors who are attempting to determine what people may or may not read. Even if the book under discussion were thoroughly pornographic—by whatever definition you want to use—I think people should be allowed to read it; nobody, in my opinion, should have

Defendants' Exhibit 24

a right to be a censor over the minds of men. Anything else makes a mockery of freedom of speech and press—one of our most fundamental liberties.

Sincerely yours,

Jesse H. Harvey
JESSE H. HARVEY, Ph. D.
Clinical Psychologist

Defendants' Exhibit 24, Annexed to Foregoing Affidavit

UNIVERSITY OF ARKANSAS
Medical Center
Little Rock
Department of Psychiatry

March 5, 1963

Mr. Ralph Ginzberg
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzberg:

I reply to your request for a statement regarding Rey Anthony's "The Housewives Handbook on Selective Promiscuity".

1. Academic degrees and professional attainments.
B.S. degree from George Washington University; M. A. and Ph. D. degrees in Clinical Psychology from The Catholic University of America, Washington, D. C. Twelve years experience in clinical psychology, presently Associate Professor and Senior Clinical Psychologist, The University of Arkansas Medical Center, Little Rock, Ark. (For additional data see "American Men of Science" and "Who's Who in the Southwest".)

Defendants' Exhibit 24

2. What constitutes "hard-core pornography" by contemporary national standards?

If we could define what is meant by "contemporary national standards", we could answer the question. But the phrase cannot be defined. It cannot be defined simply because it refers to an agglomerate. The American population is divided into many publics, each with its own characteristic attitudes and values, hence each with its own standards. For example, there is a male public and a female public; a Democratic public and a Republican public; a Protestant public, a Catholic public, and a Jewish public; there is a public of persons who have only a grammar school education, a public of college graduates, and a public of professional school graduates; there is a public of children, a public of teen-agers, and a public of adults; there is a public of voters and a public of non-voters. The standards for each of these publics are their own, with little overlap among them. Thus it is impossible to arrive at any definition of a composite set of standards. It is like being shown a barrel of oranges, apples, lemons and bananas and then being asked the question, "What is the common fruit in this barrel at the present time?" This question cannot be answered; it is illogical.

3. Is the "Handbook" hard-core pornography?

If we distinguish hard-core pornography from sexual realism, the Handbook is not hard-core pornography. It is sexual realism. Personal documents that are authentic and honest have always been accepted in law and in the social sciences as basic realities. If the "Handbook" meets the requirements of authenticity and honesty then it must be accepted as realistic, even sexually realistic. In my opinion it is exactly that, a sexually realistic personal document.

Defendants' Exhibit 25

4. Does the book have social values for society?

Unless we assume that ignorance is bliss, any contribution to knowledge has positive values for society. Our democracy is founded on the premise of an educated and informal citizenry. Ignorance retards the effectiveness of our democracy and hinders the development of the social institutions that are designed to serve it, e. g. elections, marriage, the law. There is much ignorance about actual sexual behavior in this country, particularly about the actual sexual-psychological experiences of girls and women. This book dispels a part of that ignorance, hence has positive value for our democratic society which has always placed a high premium on truth.

I wish you well on the outcome of the pending trial against you and the Handbook.

Sincerely,

S. J. Fields, Ph. D.
SIDNEY J. FIELDS, Ph. D.
Associate Professor and
Senior Clinical Psychologist.

SJF/cab

Defendants' Exhibit 25, Annexed to Foregoing Affidavit

ROGER J. CALLAHAN, Ph. D.
17000 West Eight Mile Road
Southfield, Michigan

January 31, 1963

Mr. Ralph Ginzburg
Documentary Books
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

Dr. Albert Ellis, of New York, informs me that you have been indicted for publishing "The Housewife's Handbook".

Defendants' Exhibit 26

I am very sorry to hear about this because the book impressed me as being non-obscene and a valuable contribution to the literature. The book does a lot to correct a good many superstitions about sex and also offers a valuable case history.

I certainly hope you will be able to continue to distribute this fine book.

With all good wishes, I remain

Sincerely yours,

Roger J. Callahan

ROGER J. CALLAHAN, Ph. D.

RJC/Ira

Defendants' Exhibit 26, Annexed to Foregoing Affidavit

HAROLD H. SAXTON, M. D.

Mayville, New York

February 15, 1963

Mr. Ralph Ginzburg
Documentary Books, Inc.
110 West 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg,

I have been a practicing physician in a village and rural area for 31 years. I received my degree of M. D. in 1930 from the University of Buffalo Medical School. I have been a General Practitioner.

My definition of pornography is: any publication or material, verbal or pictorial, intended to arouse sexual desire. What, you may ask, is wrong with that? The future of the human race depends entirely on the fact that people have sexual intercourse, resulting in pregnancies

Defendants' Exhibit 26

and babies. Any antipornography should be the greatest crime in history, because it would tend to diminish the chance of the survival of our species. Have you heard of the Shakers?

I have read "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony. This little book is Not pornography. I read the book with sympathy for the author. She has had a difficult task to establish her sexual position in society, but she did not arouse any feelings in me that I had not experienced before. I sympathized with her problems and difficulties, and hoped that she would eventually come out all right. The book did Not appear to me to be pornographic.

For many generations we have suffered from a false attitude toward the sex relations. Not too many generations ago, the only forbidden material was anti-government. No one could attack the idea that government was ordained by God. In 1500 sexual affairs were discussed openly and honestly. Are we honest today?

I feel that the book mentioned above is a valuable addition to our scanty knowledge of sex. I am certain that it should be REQUIRED READING for all people applying for marriage licenses.

Yours truly,

HAROLD H. SAXTON, M. D.

Defendants' Exhibit 27, Annexed to Foregoing Affidavit

(Letterhead of)

SANTA MONICA CITY COLLEGE
Santa Monica Unified School District

March 4, 1963

Mr. Ralph Ginzberg
Editor & Publisher
110 West 40th Street
New York 18, New York.

Dear Sir:

I am glad to respond to your request for supporting information in the evaluation of The Handbook for I feel that it is unfortunate that the American public should be treated as a massive case of arrested development, perhaps at the fifteen-year level, in need of paternal supervision of all its reading.

B. S. degree, University of Washington, major in psychology.

Two years on PhD program at University of California, Berkeley, ended by draft in 1942.

Psychologist in U. S. Army Air Forces.

Chief psychologist for Guidance Service of Los Angeles Board of Education.

Instructor in psychology and counselor at Santa Monica City College for last sixteen years.

Certified psychologist, State of California.

Member of:

California State Psychological Association.

American Psychological Association.

American Personnel and Guidance Association.

Phi Delta Kappa, etc.

Defendants' Exhibit 27

2. Pornography is indeed a difficult subject to deal with, so difficult that anybody who sets forth arbitrary lines is brave to the point of foolhardiness.

From the view of the consumer, anything can be pornographic and is if it symbolically excites sexual feelings and motives. In the extreme, this is called fetishism when normally neutral objects take on sexual significance through the learning history of the individual. Thus, from this angle, pornography is entirely relative to the person and his learned associations. To remove this pornography is to remove most of the environment.

From the view of the producer, material that is designed to be salacious, intended to excite the sexual feelings and motives is pornographic. Thus the deciding factor is the purpose of the producer. Since anything can be pornographic to those who take it so there is no absolute criterion of the material itself. Thus a decision might be based primarily on the purpose of the producer, but secondarily on the success in carrying out the purpose. If, in fact, such an effort is unsuccessful we may decide that the producer is morally reprehensible, but not criminally liable. We may criticize the murderous thought, but we cannot prosecute the murderer unless the thought is successfully realized.

"Hard-core pornography" then is material that successfully carries out the intentions of the producer to excite sexual feelings and motives.

3. The Handbook does not, in my opinion, fit this category. It is instead the description of the honest anguish of a woman groping for sexual fulfillment in a society that has not solved the conflict between biological drives and social values. It is unusually candid writing, but it is not couched in the lurid expressions replete in some other publications. The title is questionable and if it was picked to add sales appeal, then it might be considered

Defendants' Exhibit 27

offensive. However, it is a mistitle and literature about the book should make this clear.

4. In general, the failure of our society to solve these basic adjustment problems is in part due to the lack of information about the specific nature and extent of the problems, and about the practical day-to-day efforts that people make to solve them in their personal lives. We have been blinded by another aspect of cultural lag and the persistent conservatism of vested interests. The Kinsey reports pioneered an effort to provide more background information, but their faults need correction by accumulation of data from such records as the Handbook.

Also, the college counselor faces many occurrences of these adjustment problems and needs means to provide reduction of anxiety and guilt feelings, improvement of perspective on problem situations, and vocabulary for catharsis. The Handbook is a help in these ways. Wherever bibliotherapy is of value in improving mature sexual adjustment, The Handbook is useful.

Hoping this note is appropriate, I remain,

Sincerely yours,

Glenn C. Martin
GLENN C. MARTIN

GCM/s

Defendants' Exhibit 28, Annexed to Foregoing Affidavit

DARTMOUTH COLLEGE
Baker Library
Hanover, New Hampshire

7 March 1963

Dear Mr. Ginzburg:

Thank you for sending a copy of *The Housewife's Handbook on Selective Promiscuity* by Rey Anthony. This has been added to the library collections of the College.

You ask my comments about the book in connection with the action which has been instituted by the Post Office Department. While I am not a sociologist nor a psychiatrist nor any other kind of expert on human relations I find no difficulty in accepting the views of such experts as Drs. Bryan and Frumkin that this particular work has authenticity and importance in explaining behavior, and in making a serious contribution to the study of the psychology of sex. In consequence, to exclude this book from the U. S. mails would in my opinion be unjustifiable.

Under "the contemporary national standards" test which the U. S. Supreme Court has laid down, this would seem a clear case for the defense. Certainly it would seem an *a fortiori* case in jurisdictions which have cleared Henry Miller's *Tropic of Cancer*.

Sincerely,

RICHARD W. MORIN

Mr. Ralph Ginzburg
Eros Magazine, Inc.
111 West 40th Street
New York 18, New York
RWM/cp

Defendants' Exhibit 29, Annexed to Foregoing Affidavit

PERRY LANE, NYACK, NEW YORK

March 3, 1963

My dear Ralph Ginzburg:

"The Housewife's Handbook on Selective Promiscuity" is no more pornographic than the average Cook Book with recipes for omelettes, desserts, etc.

Good luck,

BEN HECHT

Defendants' Exhibit 30, Annexed to Foregoing Affidavit

MAXWELL GEISMAR
Winfield Avenue
Harrison, N. Y.

Feb. 23rd, 1963

Dear Mr. Ginzburg:

I am glad to make a statement about The Housewife's Handbook of Selective Promiscuity—and I think the title is the most misleading thing about the book.

I do not believe this could possibly fall under the heading of "hard-core pornography"—this book I mean—nor is it in my professional opinion a book that falls into the category of pornography at all.

It is in fact a remarkable case-history in psychological terms that one could find in any number of scientific or psychological books being published today, or in Kinsey's monumental study of American sexual behavior. The only difference is that it is told in the first person, and that the author does use the common sexual terms, rather than the more elevated scientific terms, in describing her experiences.

I believe in fact that a score of popular novels being published every day in the year are far more "porno-

Defendants' Exhibit 30

graphic" in intent than this book under question here. It is not possibly pornographic because it is filled with realism, with pain and with disappointment—which you do not find in erotic fantasies—with wisdom and with common sense. The writer is an unusual woman, to be sure, and oddly enough one finishes the book with a great deal of respect for her personality, and for the fact that she honestly believes in her thesis of complete sexual equality, and sexual freedom; and that she is full of scorn, and sometimes humor, at the prevailing hypocrisy of American sexual mores which does often allow everything she is talking about, but never dares to acknowledge it. I think this is an unusual book which in many ways is far superior in its descriptions of sexual experience to the so-called "marriage manuals" which we entrust to our children, but which often succeed only in making sexual love so "scientific" as to be abstract and meaningless.

Now you can use all or part of this statement, which I am glad to give you, for the sake of a free press and free thought in these United States, which also implies the freedom to discuss sexuality and sexual love as one of the basic drives in human nature.

I would like to state also that I am making this professional opinion without remuneration, or the thought of remuneration—that is, I am not being, nor do I wish to be considered as, a paid witness in any way.

I believe my qualifications for such a judgment are fairly well known in the literary field. I am a critic of reputation in this area, and a historian of the American novel during the last hundred years. I have published four books on this theme: *Writers in Crisis*, *Last of the Provincials*, *Rebels and Ancestors*, and *American Moderns*—all of them standard works which are used in most colleges and universities, which are known abroad, and are presently being translated in Italy as a standard history of the American novel.

Defendants' Exhibit 31

I have edited a score of other books by American authors, including the Pocketbook Walt Whitman Reader, the Scribner Ring Lardner Reader, just currently, The Viking Portable Thomas Wolfe, and the American Century Sherwood Anderson: Short Stories, etc. I have contributed to most of the current newspapers and magazines, including the New York Times, Herald Tribune, Saturday Review, the Atlantic Monthly, etc. I have a Columbia College BA, 1931, Columbia University MA, 1932; and have been a Teaching Fellow at Harvard, a Guggenheim Fellow, and my books have won an award from the National Academy of Arts & Sciences.

Sincerely,

Maxwell Geismar
MAXWELL GEISMAR

Defendants' Exhibit 31, Annexed to Foregoing Affidavit

ELMO ROPER AND ASSOCIATES
Time & Life Building
111 West 50th Street
New York 20, N. Y.
PLaza 7-4900

March 19, 1963

Mr. Ralph Ginzburg
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I don't know that a letter from me will be of any value to you whatsoever because, in my opinion, I have no qualifications as a judge of pornography. At the same time, however, I must add that I do not know what would constitute qualifications for a judge of pornography.

Defendants' Exhibit 32

In any event, however, I do not believe "Housewife's Handbook on Selective Promiscuity" qualifies under what I would call pornography.

I think the book is quite boringly written, and I doubt if it will do society either any good or any harm. It has a ring of authenticity, however, which makes me believe that it is exactly what it says it is—a book written by a woman describing—in terms not usually employed—her sexual experiences from a very early age to adulthood.

I can see how the book might conceivably do a small amount of good if it fell into the hands of just the right type of woman, and I don't see how it would be apt to do anyone any harm.

Sincerely yours,

Elmo Roper

ELMO ROPER

ER:bf

Defendants' Exhibit 32, Annexed to Foregoing Affidavit

March 15, 1963

TO WHOM IT MAY CONCERN:

I am a psychiatrist, married and the father of two children. In my 15 years of medical practice, I have worked in psychiatric institutions, out-patient and after-care clinics and private practice. I am certified by the American Boards of Psychiatry for the specialty practice of psychiatry and am a member of the American Psychiatric Association.

Having just carefully read the book "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony, I wish to state that, in my opinion, this book contains no material that could be considered to be "Hard-core promiscuity." It is my understanding that, by contemporary national standards, hard-core pornography consists of written or pictorial material which is designed to stimulate

Defendants' Exhibit 33

sexual imagery or emotions as its primary objective. This book represents an honest, introspective and searching effort of the author to portray her life experiences, particularly in the erotic sphere, as a clinical contribution to the understanding of feminine psychology. As such it is of the utmost necessity that the language utilized by in keeping with the socio-cultural level of the writer, rather than permit obscuring of the presentation through pretentious or artful distortion of language. Words of themselves do not constitute pornography, but rather the way and the intent with which they are used.

Based upon the above criteria, this book is not pornographic. On the contrary, it is a contribution to psychology, and should be of value to some therapists dealing with people with sexual difficulties. It might also be of some help to numerous individuals of both sexes who might be seeking further understanding of the feminine nature.

In my opinion, persons seeking stimulation of sexual fantasies would have little interest in this book.

DEAN R. ARCHER, M. D.
Imola, California

Defendants' Exhibit 33, Annexed to Foregoing Affidavit

Salt Lake City, Utah
March 7, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have just finished reading with interest your *The Housewife's Handbook on Selective Promiscuity*.

I have worked as a clinical psychologist for eighteen years and have had occasion to read at least parts of many

Defendants' Exhibit 33

papers and books on sex. This particular book certainly seems less erotic and pornographic than most, if it could be declared so at all. College boys sometimes obtain and lend sex literature to co-eds as part of a seduction process. If this book were so used, it would probably interfere with attaining the objective. It reads like a straightforward account and without the erotically intended embellishments found in many documents.

However, I am sure that the book could serve an erotic purpose to the very occasional person, just as a certain specific hair style or voice sound or kind of shoes worn can sexually arouse the occasionally bizarre person. Just because the "Handbook" might have been found to appeal to some as erotic or pornographic and that, therefore, it should be banned, would be comparable in my opinion to banning pictures of black mares because such had been found to erotically arouse some person or two.

Pornographic material is mildly annoying to me, but I do not see why such should be denied to those who like it. So, even if your book might be reacted to as pornographic or erotic by some rare persons, why should they be denied their little pleasures?

It would seem that most relatively uninformed persons reading the book might become less pre-occupied with eroticism as a result—as common exposure to nakedness in a culture where it is permitted renders the sight of the female body less sexually provocative, than would be the same body when draped.

If at the end of the book there were a statement to the effect that the author had been a wicked woman who had met punishment through poetic justice (like in some books and movies), perhaps the book would then be justified in the eyes of those who now condemn it.

Very truly yours,

H. B. Hovey

HENRY B. HOVEY, Ph. D.

Defendants' Exhibit 34, Annexed to Foregoing Affidavit

GEORGE J. WITTENSTEIN, M. D.
Thoracic and General Surgery
2324 Bath Street
Santa Barbara, California
Woodland 5-3016 or 5-3017

March 5, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.


Dear Mr. Ginzburg:

In response to your request I am happy to tell you that I have read Mrs. Anthony's "The Housewife's Handbook on Selective Promiscuity" with great interest. I have been a physician for 19 years, have several graduate and postgraduate degrees and am author of 22 medical papers. In my opinion this "Handbook" is not only not pornographic, but a very frank and candid description of the mental, sexual and ethical development of an individual for whom I can have only the highest respect. I would have no hesitation in recommending this book to young couples seeking premarital advice.

I sincerely hope that you will be successful in defending your cause.

Truly yours,

G. J. Wittenstein
GEORGE J. WITTENSTEIN, M. D.



Defendants' Exhibit 35, Annexed to Foregoing Affidavit

13 Highgate Westhill
London N. 6

Re.: Rey Anthony's "A Housewife's Handbook on Selective Promiscuity."

We have found Rey Anthony's book a deeply moving human document; not a particularly cheerful one; and certainly a great disappointment to those who may approach it hoping to find it a licentious one. But it is so obviously and utterly sincere that for this alone it is a sort of classic even among autobiographies.

Its special value lies, as far as we are concerned, in precisely this quality of absolute honesty which pervades every page of the little book. But it has other merits as well: one is that it constitutes one of the very rare autobiographies which are factual and truthful about the generally hushed-up area of sexual development and experience. Add to this that the book is written by a woman which makes it even still rarer and more valuable in this respect. And this scientific significance of the book is still further manifested immensely by the fact that its woman author does not so much relate sexual experiences as such, but within the framework of the accompanying psychological emotions and physical sensations which she as a woman underwent in the course of these—in and by themselves common and trite enough—events.

From this point of view we can only compare Rey Anthony's book with the very few (and for the most part unpublished) autobiographical works of women which have come to our attention in the course of research. In fact, what struck us the most about Rey Anthony's book was the astonishing degree of similarity with that material and its inner consistency with the case history material in our files relating to the sexual response of women. All of this

Defendants' Exhibit 35

tends, of course, to confirm the truthfulness and scientific reliability of Rey Anthony's account.

As to the problem whether we would consider Rey Anthony's book "pornographic", one can only be amazed that such a question could even seriously be raised about a work of this kind. The "Housewife's Handbook * * *"—and here we believe to be somewhat expert in our opinion—has absolutely *none* of the characteristics of "hard-core pornography"; as previously indicated, we do not even find it particularly "erotic" or "stimulating", even in those parts which deal more specifically with sexual experience. Perhaps this is so because in reading the book one becomes far too involved in the intense human drama behind the sexual events; or it is because of the almost scientific "objectivity" with which the author talks about her sexual experiences, or yet because of a certain moral decorum, so typically feminine, with which she relates them. At any rate, we can see nothing pornographic, obscene, or indecent about Rey Anthony's book.

As to the question whether Rey Anthony's book is within "contemporary community standards", we would say that the work nowhere exceeds them or offends the good taste or esthetic sensibility of any reasonable person. Much of contemporary fiction is much more detailed and certainly erotically more provocative than this—one is tempted to say—harmless and innocent, though honest, autobiography. Even some of the current "Marriage Manuals" are more specific in clinical description and more "daring" in many respects than Rey Anthony's book.

Defendants' Exhibit 36

As psychologists we would recommend the book unhesitatingly to adults and selectively even to adolescents for its inherent therapeutic and educational value.

Phyllis C. Kronhausen
PHYLLIS C. KRONHAUSEN, Ed. D.

Eberhard W. Kronhausen
EBERHARD W. KRONHAUSEN, Ed. D.

Qualifications:

Members: American Psychological Association; Certified Clinical Psychologists, New York State and California State; Specialists in Marriage and Family Life Education, Teachers College, Columbia University; etc.

Defendants' Exhibit 36, Annexed to Foregoing Affidavit

LAURENCE S. BAKER, PH. D.
62 Waller Avenue
White Plains, New York
WHITE PLAINS 9-8256

Profession: Clinical Psychologist.

Education: Ph. D. degree in clinical psychology.

Present positions: Private practice, White Plains, working with children, adolescents and adults; psychotherapy and psychological testing; public speaking. Consultant to several schools.

Associate in Psychology, Intertecna-Interdiscipline in Technology.

Staff Psychologist, Jennie Clarkson Home for Girls.

Defendants' Exhibit 36

Professional organizations:

American Psychological Association, member.
 New York State Psychological Association, member
 Clinical Division, member.
 Directory Committee, chairman.
 Committee on Relations with Community Mental Health
 Boards, member.
 Westchester County Psychological Association, member.
 Chairman, Westchester Center for Psychological Educa-
 tion (Low Cost Services).
 President-Elect.
 Member, Executive Board.
 Former Chairman, Education Committee.
 Former Chairman, Professional Services Committee.
 New York Society of Clinical Psychologists, member.
 Nassau County Psychological Association, founding
 member.
 Kappa Delta Pi, member.
 Phi Delta Kappa, member.
 New York Academy of Sciences, formerly member.

March 5, 1963

Mr. Ralph Ginzburg
 Documentary Books, Inc.
 110 West 40th Street
 New York 18, N. Y.

Dear Mr. Ginzburg:

I am happy to supply you with a letter giving my
 opinions about the book "The Housewife's Handbook on
 Selective Promiscuity" as you requested. As you know,

Defendants' Exhibit 36

I have already written to the Post Office Department, the American Civil Liberties Union, and Senator Jacob Javits, commenting upon the banning of this book from the mails, prior to receiving your request.

As I understand the term "hard-core pornography", it refers to writings the *sole* purpose of which is to arouse sexual responses in the reader; books which have other aims would not fall into this classification. "Contemporary national standards" I understand to mean that standard which would be applied by the community at large, rather than by a specific segment thereof. I believe that under such standards, hard-core obscenity or pornography would have to be grossly devoid of any literary merit, fail to communicate (or rather, fail to *try* to communicate) any emotional understanding, and in addition, be completely devoid of any attempt to communicate the author's understanding of reality. Frankly, I find it hard to conceive of such a book, but theoretically, they may exist.

In my opinion, the Handbook does not meet such a standard of hard-core pornography, on several counts. First, it clearly and definitely is not purely erotic in nature. The report of the author's experiences in pregnancy and delivery, for example, can by no stretch of the most prurient imagination be called erotic; if anything, they are anti-erotic in effect. True, these segments of the book may offend some persons, but so do the Bill of Rights and the Bible offend some persons. I think that there are other aspects of this book which would have an erotic effect on many readers, but it is my opinion that these effects derive from the quality of the author's experiences. A sexual response is a normal and healthy response in many situations; reading about one person's sexual experiences, especially when recounted with the sensitivity and clarity of the author under discussion *ought* perhaps to produce such an effect. But to assume that such an effect is bad, and that writing which evokes it is pornographic, is to

Defendants' Exhibit 36

condemn readers to nothing more stimulating or intellectual than the Bobbsey Twins.

I would go a step further to suggest that this book is indeed a very valuable little piece of writing. It manages to convey to me a sense of how a woman may feel in a sexual situation which I have not been able to secure at any previous time. Despite the statement of the Post Office Department sent to Senator Javits and forwarded to me, that "competent authority had previously indicated that the book would not be of value to the public health or medical profession" (and, by implication, the psychological profession) I have found it most valuable.

Regarding the law itself, it seems to me to be foolish, at the very least. The "average person" whose opinion is taken to be decisive, does not exist. "Community standards" vary; in the community of psychologists to which I belong, for instance, this book would be received quite differently than in the community of PTA parents to which I also belong. That "prurient interests" would be stimulated in some is of course demonstrated by the fact that the prurient interests of the Post Office Department and perhaps some Congressman have been stimulated. But this does not prove that such is the purpose or aim of the book.

I have found it most difficult to find out something about how women feel about sexual experience, in words which carry conviction and a sense of reality. I am very happy to be able to read this moving book, which seems to be to a valuable autobiographical document. If public opinion were to determine what I could read, many of the professional books on my shelves would be unavailable. I do not believe that the standard of community acceptance has any validity to begin with; and I do not believe that this book should be suppressed even under such standards. As a matter of fact, I question the total idea of censor-

Defendants' Exhibit 37

ship, on the basis that one man's literature is another man's pornography.

I hope that this statement is useful to you. Should you wish any further comment, please feel free to contact me. Good luck in your case.

Very truly yours,

Lawrence S. Baker
LAURENCE S. BAKER, PH. D.
Certified Psychologist,
New York State

P. S. As a matter of fact, it seems that a strict reading of Section 1461 of Title 18, United States Code, amended by Public Law 85-796, under which the Post Office Department impounded this book, would prohibit writing one's Congressmen regarding changing of the law, which seems ridiculous. L. S. B.

Defendants' Exhibit 37, Annexed to Foregoing Affidavit

EDWARD C. FALK, M. D.
436 Hazen Road
Sharpsville, Pa.

February 27, 1963

Mr. Ralph Ginzburg
Editor & Publisher
Eors Magazine, Inc.,
110 West 49th St.,
New York 18, N. Y.

Dear Sir:

Medically speaking, after thirteen years of practice in general surgery, I feel "The Housewife's Handbook on Selective Promiscuity" is an intensely interesting psychology study. It should be useful to anyone engaged in

Defendants' Exhibit 38

marriage counselling. I feel it would do much for women who, through ignorance, have come to consider themselves sexually inadequate. There is a constant need for frank discussion of female sex attitudes.

"Handbook" presents material in a form which the layman can understand and which is not hidden in medical terminology. The sex education it offers is sound and effective.

The writing in this book does not have the tenor of pornography but rather that of a straight forward factual presentation which I feel was the author's intent.

Yours, truly,

(Signed) E. C. Falk, M. D.

EDWARD C. FALK, M. D.

ECF:BF

Defendants' Exhibit 38, Annexed to Foregoing Affidavit

FIVE PARKWAY
Hanover, New Hampshire

March 11, 1963

Mr. Ralph Ginzburg
Editor and Publisher
Eros Magazine, Incorporated
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have received your letter concerning your indictment by a Philadelphia Federal Grand Jury and your request for some statement from me regarding my opinions of the book, *The Housewife's Handbook on Selective Promiscuity*. I am happy to give you my opinions of this book. I have read it with care and interest.

Defendants' Exhibit 38

May I first preface the statements which follow by saying that I am responding to your request in my capacity as an individual trained in the field of psychology, *not* as a professor of psychology and chairman of the department at Dartmouth College, my present position and institutional affiliation. I express this qualification to insure that my remarks are interpreted as an expression of individual judgment and opinion and bear no relation to the institution which employs me. Insofar as my professional training lends any special weight to my statements, let me say simply that I hold an M.A. and Ph.D. degree in psychology from Princeton University and have taught psychology for thirteen years, nine of them at Princeton and four of them at Dartmouth. I am a member of a number of professional societies, including the American Psychological Association, and have authored two books in psychology and over two dozen research papers appearing in various scientific journals.

My opinion of what constitutes "hard-core pornography" in terms of "contemporary national standards" is clear, at least to me; namely, there is no valid concept of "hard-core pornography" according to such standards for "contemporary national standards" is a myth until someone measures them. Who is to say? What are the criteria? If I *had* to define what constitutes "hard-core pornography" in terms of "contemporary national standards," I could do so only by example—a rather nonrigorous means of definition. The example would be the "dirty comic books" wherein well-known comic strip characters are depicted tastelessly and blatantly in sexual intercourse. The book in question here is so far removed from such an example that I do not see how any reasonable person could treat them as the same or even remotely similar.

The Housewife's Handbook on Selective Promiscuity could be construed as hard-core pornography or porno-

Defendants' Exhibit 38

graphic (whatever the difference is) by only the most rigid of moralists—in my opinion. Of course, an extreme moralist can make any public expression of sexuality pornographic. I find the book in question a candid, unpretentious, and honest account of one person's search for sexual sanity and meaning in life. The fact that her frankness is expressed by language unembellished by circuitous idiom and quasi-technical jargon does not make her account in any sense pornographic—it simply makes her experiences meaningful to the reader. She writes about sexuality the way many people experience it—the good, the bad, the confused—all of it. As a plea for a more naturalistic view of sex and as a document of sexual experience of unusual honesty, I would hope that many people would read this book. It is an excellent antidote to the prudery, the dishonesty, and the self-deception that surrounds sex in this society.

I hope sincerely that your efforts in defending against the indictment helps insure that the postmaster general is kept busy in the future delivering the mail—not passing on the morality of what's in it.

Sincerely yours,

(Signed) William M. Smith
WILLIAM M. SMITH

WMS:JAR

Defendants' Exhibit 39, Annexed to Foregoing Affidavit

THE EAST WHITTIER UNITED PRESBYTERIAN CHURCH
A Community Church
1244 East Second Street
Whittier, California

ROBERT L. CALDWELL, Minister

20 February, 1963

Mr. Ralph Ginsburg
110 West 40th Street
New York 18, New York

Dear Sir:

I have received the copy of the *Housewife's Handbook on Selective Promiscuity* and have read it. (Incidentally, I ordered a copy some months ago, with a check, and have not as yet received it.)

As a minister of a large church in an urban community, with the A.B., B.Th., Th.D., and D.D. degrees, and with nearly twenty years of professional experience in the field of pre-marital and marital counseling, I have needed such a book as this Handbook and am grateful that it is finally available.

For too long sex facts have been disguised in technical terms. Every book on sex and marriage on my shelves refers to the "genital kiss". The handbook plainly puts the cards on the table and any layman can understand the terminology. Plain language cannot and does not constitute pornography, "by contemporary national standards" or by any Christian standard I know. I find nothing of prurient or salacious character in the handbook, and shall find myself referring to it often in my work.

If this Handbook was weighted with descriptions of abnormal sex acts, and if it was clearly designed to stimulate

Defendants' Exhibit 40

the sex drive, I would find it valueless. It seems to me that such is not the case.

Very sincerely yours,

(Signed) Robert L. Caldwell
ROBERT L. CALDWELL

RLC:mb

Defendants' Exhibit 40, Annexed to Foregoing Affidavit

DRS. P.G. AVALON AND T.A. MANNING
Cathlamet, Washington

February 22, 1963

Ralph Ginzburg
Eros Magazine, Inc.
110 West 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg,

I sent for this book because of advertising that was sent to me suggesting that this book was of value for "marriage counselors". I read the copy you sent me and I feel certain you would not want my opinion for defense. I feel that at best this is a shallow attempt at sensationalism. Actually I agree with the post office authorities. This book in my opinion is obscene or else just poorly done. To take the writings of an obviously disturbed person (or else crafty enough to aim at erotic stimulation) and present them as a study in female sexual practises is either poor writing and editing or as the post office claims actually pornography.

I forbid the use of my name in anyway in relations to this book except in a critical fashion. Had I known its contents I would never have purchased it and I have

Defendants' Exhibit 41

learned a lesson regarding purchasing books through the mail. Henceforth it will be only from a known house or at least a known volume.

Sincerely,

Phillip G. Avalon
PHILLIP G. AVALON, M. D.

PGA/ef

Defendants' Exhibit 41, Annexed to Foregoing Affidavit

ALAN F. GUTTMACHER, M. D.
501 Madison Avenue
New York 22, New York

PLaza 5 - 8800

March 6, 1963

Mr. Ralph Ginzburg
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

The reason I did not acknowledge the book on Selective Promiscuity is that I had a puritanical revulsion to it. I have never before thrown a book in the wastebasket but I did and when I tried to retrieve it twenty-four hours later, it was gone and is either enriching the library of the maid or the apartment trashman.

I thought the book was indifferently written and served no real purpose. It began with a rather elaborate apology by Ellis and then by the author's daughter which created uncertainties in my mind before I read it. When I read it I had the feeling that some of it might be of value between the covers of a scientific journal but not useful to

Defendants' Exhibit 42

the lay public. I assumed such thoughts would be of no value in your struggle with the Post Office Department and therefore did not commit them to paper.

With cordial regards.

Sincerely yours,

ALAN F. GUTTMACHER

AFG:mp

Defendants' Exhibit 42, Annexed to Foregoing Affidavit

PRINCETON UNIVERSITY LIBRARY

Princeton, New Jersey

WILLIAM S. DIX, *Librarian*

February 15, 1963

Dear Mr. Ginzburg:

You have sent me a copy of a book entitled *The Housewife's Handbook of Selective Promiscuity*, together with a letter in which you ask several questions. Having examined the book, I must reply to your questions as follows:

1. I hold a Ph.D. in English from the University of Chicago and thus presumably have some professional training for judging the literary merit of a book. I have no professional qualifications whatsoever for judging the sociological or medical value of a book.

2. I decline to attempt an interpretation of the phrase "hard-core pornography" as used by the Supreme Court. My own personal test goes something like this: A book is pornography if the only possible reason for its publication is pornographic. That is, if a book contributes nothing to scientific knowledge, if it has no literary value, etc., etc., and its primary ingredient is sex, I suspect it of being pornographic.

3. In my opinion, the *Handbook* is pornographic. I am confident that it is absolutely without literary merit, and I suspect that it has no scientific merit, etc. etc.

Defendants' Exhibit 43

4. In my opinion this book is completely without value to society.

I am returning the book to you by Railway Express.

Yours truly,

WILLIAM S. DIX

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Defendants' Exhibit 43, Annexed to Foregoing Affidavit

February 19

WOODSTOCK COLLEGE
Woodstock, Maryland

Dear Mr. Ginzburg:

I am of no use to you in your legal situation. By my profession, as a priest, I am forbidden to intervene in any way in actions at law.

I am therefore free to take the question at a higher level. The question then is not whether your book (yours by adoption) should be allowed to go through the mails. The question is the value of your book.

I read it. Its value is obviously zero. Its theme (in so far as it has a theme) is banal and nugatory. We all know that sex is mysterious and that the mode of initiation into its mystery is, for that reason, difficult, and for that reason, often botched. This is not news.

The technique for the development of the theme (Rey Anthony's clinical description of her sexual experiences) is irrelevant, superfluous, ineffective, and in the end boring.

The book therefore has no value, no public value. In consequence the issue of "obscenity," in some legal sense,

Defendants' Exhibit 44

is trivial. The real issue is, whether the book is stupid. I think it is.

Your legal situation is interesting. The question is, whether you are to be indicted as a knave or a fool. These are not indeed legal terms. But they state the issue at a level more profound than the level of law. For my part, oddly enough, I tolerate knaves more readily than fools. Especially fools who want to make money out of stupidity. As I presume you do. You surely are not so stupid as to tell me that you publish EROS out of sheer love of the truth, and beauty, and goodness. There are limits even to rationalization. You know you have a market.

Faithfully yours,

John Courtney Murray, S. J.
JOHN COURTNEY MURRAY, S. J.

Defendants' Exhibit 44, Annexed to Foregoing Affidavit

SWARTHMORE COLLEGE
Swarthmore, Pennsylvania

February 20, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

This is in reply to your letter about Rey Anthony's book. As a psychologist, I am in no way qualified to take a stand on the matter. I am an experimental psychologist and do not deal professionally with social problems.

Defendants' Exhibit 45

Speaking as an ordinary observer: I see no merit in Mrs. Anthony's book. As a literary product, I find it quite repulsive and as a social document, unnecessary.

Sincerely,

Hans Wallach
HANS WALLACH
Professor of Psychology

HW:dj

Defendants' Exhibit 45, Annexed to Foregoing Affidavit

MASSACHUSETTS INSTITUTE OF TECHNOLOGY
Cambridge 39, Massachusetts
the Libraries

13 March 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

You asked for my evaluation of *The Housewife's Handbook on Selective Promiscuity*.

I think this book is pornographic in intent and in execution and should not be available to the general public. If it is a medical document of importance it should be made available to doctors in the usual way.

I am convinced that the author and publishers of this book have as their only intent the making of money by exploiting the baser sides of human nature. They should be put in the same category with purveyors of dope and prostitution.

Very truly yours,

William N. Locke
WILLIAM N. LOCKE
Director of Libraries

WNL:bd

Defendants' Exhibit 46, Annexed to Foregoing Affidavit

ROBERT CUSHMAN MURPHY
"Briarlea," Old Field
Setauket, L.I., N.Y.

23 February 1963

Mr. Ralph Ginzburg
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

Thank you for your letter and Rey Anthony's book. I had already noted with satisfaction that the Civil Liberties Union had associated itself with your defense against Post Office censorship.

I am a biologist, not a physician. I hold a Bachelor's, Master's and two doctoral degrees. Now retired, though still engaged in research, I have been successively or contemporaneously a university teacher, president of a biological laboratory engaged in genetic research, and staff member of a natural history museum.

My conception of "hard-core pornography" is published matter which has no other purpose than to entertain by descriptions of sexual aims, acts and relationships.

Mrs. Anthony's book by no means fulfills this definition. It contains matter of broad biological and sociological value. The welfare of most adults would be bettered by a knowledge of her own case history. It is not necessary to agree with her in all aspects of taste or to assume that her personal point of view should control every (or even any) other individual. She has, however, written without inhibition a rare and useful reflection of the sexual life of one articulate human being.

Her book could, of course, be put to pornographic ends, but the same is true of the Bible. Its object is palpably

Defendants' Exhibit 47

to present with conviction alternate standards of human behavior which are not yet widely, and certainly not openly, accepted.

Yours very truly,

R. C. Murphy

Defendants' Exhibit 47, Annexed to Foregoing Affidavit

(Letterhead of)

THE UNITARIAN CHURCH OF TUCSON, ARIZONA

Feb. 22, 1963

Mr. Ralph Ginzburg
Editor and Publisher
110 W. 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg:

Thank you for sending me the copy of the "Housewife's Handbook."

I am the minister of the Unitarian Church of Tucson, a graduate of Boston University and of the Andover-Newton Theological School, and have no other claim to distinction other than as a parish clergyman.

The "Handbook" I have been familiar with for some time, having one of the original copies in the multi-lith edition. Both of my college-age daughters have read it, as have my secretary and a number of my parishioners and friends.

You ask, "what is hard core pornography" by contemporary national standards? I would say that it is that which passes beyond a rather tenuous line, into the realm of the non-artistic and non-literary, and which has the obvious intent of having been produced mainly for its erotic effect

Defendants' Exhibit 47

and its appeal to abnormal sexual passion. Such a work should be judged as a whole and not by appeal to isolated passages, and especially by its effect upon a relatively normal person of good emotional health. Ordinarily, in such a person the first impression would probably be of some degree of sexual excitement, followed by one of disgust. Good taste, which of course cannot be legislated, has a great deal to do with it but is not the guiding factor.

Is the "Handbook" pornographic. By part of this definition I have just given it is. Many who have read it have confessed to some sexual excitement. Several have been disgusted. One housewife called it "nauseating." The more frequent comment has been "boring."

I know there is a copy at a Lockheed plant in California that is being rented out at a stiff fee, and I have been assured that the interest shown by readers is that afforded to pornographic literature.

Several, however, who have read it have gone out of their way to assure me that although it was "boring" or even "disgusting" they did not feel it was pornographic. My daughters were impressed by the plea made by the author for a more sane approach in treating sex matters. I have only found one who thought the book should be suppressed.

I personally feel that it is inappropriate for popular distribution, but does that make it "obscene?" No, for the author's intentions are clearly stated. Even though some of us may disagree violently with her thesis, and especially her way of presenting it in such a stark and shocking way, we cannot put this book in the same category as many that I have seen, which are obviously and completely written for one purpose only—to appeal to the lowest passions of ignorant people.

One of the factors common to most "hard-core" pornography is the portrayal of sexual themes in an absurd or bizarre or highly exaggerated context. I have in mind a bit

Defendants' Exhibit 47

of colored paper which, when folded properly and held up to the light, shows four human figures engaged in socially-frowned-upon sexual acts. Most "hard-core" pornography contains an exaggerated absurdity. It goes beyond even what he might call perverse or abnormal into the outright fantastic. Does this book do this? It does not. It presents a rather repetitive series of sexual experiences in a clinical setting, and is not a departure from reality even though it may be a departure from the desirable.

What value does it have to society? In the medical and counselling fields, considerable, and I have so used it. In the hands of the ordinary layman, many of the points raised will be missed, almost in direct proportion to the education of the reader. It certainly is an unfortunate book. The author has told me that she deliberately used the vernacular so that non-technically trained readers would know what she was talking about. She succeeded only too well! But again, one has to raise the question—is its general impact that of obscenity, or that of an educational or literary production? It is not, by almost any standard, well written. Dr. Bryan states that it is neither a handbook nor a guide to sexual behavior. Could it be so taken? Perhaps, by the emotionally immature and impressionable. But is this a cause for censorship? No, no more than the works of Machiavelli or those of Hitler, which contain repugnant ideas also, should be censored. Perhaps had it appeared in another format, associated with medical textbooks, it might be more acceptable.

It was not so published, however, and is apparently available to anyone who has the price. So we come again to the question, what values has it to society? I think it is a book that would not be missed by the layman, but to the researcher and especially to those in counselling fields, it is definitely a contribution to knowledge.

This, however, is not the real question. If we can censor one book with which we do not agree, then we can censor

Defendants' Exhibit 47

any book and this is not the function of a democratic society. Bad taste, poor literary judgment, even inappropriate or questionable ideas, these are not the point. There is a case for the prosecution of a certain type of well-recognizable commercial pornography, with no redeeming qualities and whose appeal is palpably prurient, but even this control is fraught with risk unless used with the utmost discretion.

We must trust people. We have no right to set up an "index", and the fact that I or anyone else might wish to have this book on my shelves for special use but would also wish to deprive it from casual reading by giggling high school students is not a legitimate case against this book. In fact, such an attitude, even though I subscribe to it in part, runs dangerously close to that of the garrison state. Such privilege is actually not becoming to intellectual freedom and should be invoked only as a last resort. We can *channel* publications of this type, if we so desire, so that the chances of their falling into the hands of the impressionable is remote, but this is a type of responsibility that lies beyond the power of the courts, and rests in private rather than in public hands.

I must admit that for those who recoil violently (as I do) from the type of sexual permissiveness advocated by "Rey Anthony" this is a somewhat extreme type of permissiveness. Yet, as Americans, I feel most strongly that we as Americans must be able to stand the consequences of our own freedoms and if we cannot, then we have failed miserably in our most basic premises.

Therefore, to summarize, even though as some have said the book may be dull, devoid as some have said of any great literary merit, boring as it is to many and offensive as it is to some, it is a book of honest literary intent, sufficiently valuable to society, sufficiently redeemed by bringing out

Defendants' Exhibit 48

into the open a phase of life too often suppressed, to fall outside of the definition of "hard-core" pornography. In my opinion, the publisher should not be prosecuted, even though he is on a very thin line indeed at some points.

Sincerely,

George C. Whitney
GEORGE C. WHITNEY
Minister

Permission to quote from this letter is granted only under the proviso that it be used in its entirety, or at least, by entire paragraphs.

Defendants' Exhibit 48, Annexed to Foregoing Affidavit

EMORY UNIVERSITY
Atlanta 22, Georgia
Candler School of Theology

March 19, 1963

Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Gentlemen:

Through a friend, who is a psychologist, a copy of your book, *The Housewife's Handbook on Selective Promiscuity*, came to my attention. It was read with much interest and with some advancement in my understanding of the expression of sexual feelings in women. For my personal use it was valuable, but the ethical standards of Mrs. Anthony are too much at variance with those of Candler for me to ask the librarian to secure a copy for the use of our students.

However, our students very much need materials which will broaden their understanding of sexual relationships.

Defendants' Exhibit 49

They need materials which will approach their sexual behavior in a way that does not threaten their standards so much that they have to reject the information given in order to protect themselves against too much anxiety. Therefore, I would be interested in materials which you might have which could accomplish this goal.

Would you please send to me your booklist and any other information which you feel would be of value in aiding me to interpret the titles of the books? This would be very much appreciated.

Incidentally, in addition to being a minister of The Methodist Church, I am also a member of the American Psychologist Association. I believe that my attitudes regarding sex are probably a good bit different from that of many other ministers.

Respectfully,

Quentin L. Hand

QUENTIN L. HAND, PH.D.

Asst. Prof. of Psychology and
Pastoral Counseling

Defendants' Exhibit 49, Annexed to Foregoing Affidavit

ELLIOTT H. MORSE

231 Essex Ave.

Narberth, Penna.

March 13, 1963.

Dear Mr. Ginsburg:

In accordance with your request of January 31st I have read "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony. My replies to your four specific questions follow.

1. I have academic degrees from Haverford College, Drexel Institute of Technology, School of Library Science,

Defendants' Exhibit 49

and the University of Pennsylvania. I have been employed in the libraries of the University of Pennsylvania and Temple University and am presently employed as Librarian of the College of Physicians of Philadelphia. I have held office in the Special Libraries Council of Philadelphia and in the Medical Library Association. I have edited two library magazines. I am President of the Board of Trustees of the Narberth Public Library.

2. To me, hard-core pornography is material specifically produced to stimulate sexual response without any literary, artistic or scientific merit. Its intention is solely to gain a profit by catering to the taste for the sensational. It is most frequently characterized by photographic or other illustrative material posed or delineated in suggestive or provocative attitudes. Obscenity itself, I take to be determined by the context in which it is used. Narrow definitions of obscenity could be applied to the Bible and to Shakespeare. Certainly the author's intent is more pertinent than the choice of particular words.

3. The Handbook certainly does not qualify as "hard-core pornography". It is certainly not in the same category with the so-called "Girlie magazines" and other newsstand trash which is so frequently displayed and sold on corner display racks.

Although it is not pornography or even obscenity, I would not recommend its general availability in public libraries or on sidewalk newsstands any more than I would consider it appropriate to so distribute manuals of obstetrics or technical treatises on cancer and liver diseases.

Many case studies of the psychiatrically disturbed personality are available to medical students and practitioners and they are allowed to go through the mails without interference. It is usually presumed, however, that the purchasers of these books have sufficient scientific background

Defendants' Exhibit 49

to understand and evaluate the material and will not assume that anything in print is true and normal.

Rey Anthony's book is an interesting case study. However, a single case study without competent professional analysis is of doubtful scientific value. Furthermore the author's criticism of modern moral and legal values without the proposal of any practical substitute is a destructive rather than a constructive approach.

The author's criticism of marriage, her advocacy of polygamy, her defense of abortion, and her ridiculing of the "normal" sound suspiciously like the rationalizing of a person who was unable to establish a well-adjusted marital relationship. Her inability to determine the parentage of several of her own children suggests a social situation which would create as many problems as the one she is criticizing. The author herself may be a disturbed personality and we may be horrified to learn of her counselling activity but her book is not pornography nor it is obscene.

4. The value of this book to society is marred by its poor organization and by its absence of literary merit. Dr. Ellis' brief introduction is an inadequate evaluation for the highest scientific purpose.

On the credit side, the author may be complimented for her plea for teaching children proper terminology for parts of the body and for body function. Such instruction should go a long way toward the prevention of obscenity and pornography. The harm of raising children in an unhappy marital situation deserves emphasis even if we suspect that the author did not always choose her mates wisely or exhaust all possible means of making her marriages work.

Our divorce rate could be materially reduced if the author's advice were followed to define the limits of a situation before it is entered into and if prospective husbands and wives were thoroughly explored each other's basic attitudes.

Defendants' Exhibit 50

In conclusion, I do not believe that this is a great book, a well written book, or any significant contribution to scientific advance but at the same time I am convinced that it is neither obscene nor pornographic.

Yours very truly,

Elliott H. Morse.
ELLIOTT H. MORSE.

Defendants' Exhibit 50, Annexed to Foregoing Affidavit

MARY S. CALDERONE, M. D.
245 Kings Point Road
Great Neck, New York
HUnter 7-4005

March 7, 1963.

Mr. Ralph Ginzburg
Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have just returned from a six weeks' trip to Europe and Asia which will explain my failure to answer your letter more promptly.

First of all, in making the following statement, I wish to stipulate that if it is used at all it must be used in toto. I do not wish any single statement to be taken out of context and quoted in any connection whatsoever either legally or extra-legally. First thing I want to make clear is that I hold no brief for Mrs. Anthony's book as far as intrinsic value to the general public is concerned. Its sole value lies in its clear-cut chronicling of the development of sexual feeling in a woman, and in the way it depicts the various adverse influences on such development as they all too often occur in our society. This chronicle is valuable in that we have all too little knowledge of the process. But

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the value stops there because I am at complete odds with the stupid and misleading title, with the role that Mrs. Anthony has accorded sex in her life—i.e.: as an end experience in itself rather than as a means of communication with a life mate—and I am particularly at odds with the very “promiscuity” that is noted in the title, and with the inclusion of her own daughters in this kind of an atmosphere. I do not believe that this is how young people are taught to integrate sex as a constructive force into their lives.

The major defect lies not in the book but in Mrs. Anthony herself: she has never progressed beyond sex as a source of self-gratification. Even the way she obtains this gratification is essentially onanistic. Thus she has apparently been arrested at a fairly low level of sexual development. She does not make this clear in the book because she is undoubtedly unaware of it, and it is probably her own personality defects that would render her unable to reach into the higher phases of sexual experience, that is, the truly communicative phases.

As to the basic question—is the book pornographic, I would give my opinion as no, it is not. This opinion stems from my Webster's New World Dictionary definition of pornography as “writings, pictures, etc., intended to arouse sexual desire”. The key word here is “intended”. As far as I am concerned I can go to any corner drugstore or bookstand, particularly in the less privileged areas of any city in this country, and pick up magazines and soft cover books that clearly fulfill this definition: they were written with the prime *intent* of arousing sexual desire in the reader. I am convinced that Mrs. Anthony's book was not written with any such intent, but rather with an honest intent to inform and to educate—to clear up an area that is in our society obscured by ignorance and fear—creating terrible sexual and marital disabilities that result in great unhappiness among men and women, some of whom have written to me about this. As a matter of fact I have quoted some of these letters in my own book “Release from Sexual Tensions”.

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I believe that the question of pornography lies perhaps more with the reader than with the book. There are countless numbers of publications in public and private libraries that can be read with pornographic intent, although they are clearly not written with such intent. That Mrs. Anthony's book can suffer from this disability should not, I believe, render it liable to suppression. Such an action would most certainly be straining at the gnat while swallowing the camel. Let our authorities proceed against the all too many camels easily and readily available to all of our young people in corner drugstores, station and airport newsstands, etc., and let them stop wasting their time and taxpayers money on going after this one simple little fly with a tar brush big enough to knock down the Empire State Building!

Very truly yours,

MARY S. CALDERONE, M. D.

msc:rd

Dictated but not read

Defendants' Exhibit 51, Annexed to Foregoing Affidavit

CITY OF PHILADELPHIA
The Free Library of Philadelphia
Logan Square, Philadelphia 3, Pa.

March 8, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

Your letter concerning the *HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY* is at hand.

I am a firm believer of freedom to read, freedom of the press and believe that all persons concerned also have a responsibility to society.

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The book in question is not one for general reading in my opinion. It would seem that its chief value would be to those in the fields of social welfare, psychiatry and medicine. What the evaluation of the book by experts in these fields would be, I do not know.

The book is being returned to you under separate cover.

Sincerely,

Emerson Greenaway
EMERSON GREENAWAY
Director

d

Defendants' Exhibit 52, Annexed to Foregoing Affidavit

SOPHIA J. KLEEGMAN, M. D.
Fifty-Nine East Fifty-Fourth Street
New York 22, N. Y.

Telephone PLaza 3-8839

March 15, 1963

Mr. Ralph Ginzburg
Eros Magazine, Inc.
110 West 40 Street
New York 18, New York

Dear Mr. Ginzburg:

My evaluation of Rey Anthony's book is that to me it seems a synthetic work about an unreal person. If she actually exists as portrayed, then she is just as emotionally ill, and sexually maladjusted as is a totally frigid woman. Both lack the capacity to love and are unable to achieve maturity.

Defendants' Exhibit 52

In view of my negative reaction to the book, and to the author's way of life, I do not know whether you wish any help from me. If you do, and if you agree to quote the following paragraph in its entirety, you may do so. However, you may not take out only an excerpt for your use. This is my statement:

Rey Anthony portrays her emotional and physiological sex life, which is the abnormal experiences of an emotionally ill woman. Her illness makes it impossible for her to develop into the kind of woman, wife, and mother who can build a healthy emotional climate for her husband and children. Rey Anthony is hurtful for society. However, it would be just as hurtful to have the book banned. This book has a right to be written, and it has a right to be distributed. In my role as educator, I shall oppose every influence which results in a Rey Anthony. In my role as citizen, I just as strongly oppose the type of censorship which would suppress what she has to say.

Sincerely yours,

Sophia J. Kleegman, M. D.
SOPHIA J. KLEEGMAN, M. D.

SJK:bj

cc. to Doctors Calderone, Levine and Ellis

Defendants' Exhibit 53, Annexed to Foregoing Affidavit

J. C. BEESLEY, M. D., F. A. A. P.
Infants and Children
525 Frederick Street
Lancaster, Ohio

March 15, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 W. 40th St.
New York 18, N. Y.

Dear Mr. Ginzburg:

In reply to your letter.

I graduated in 1943 from the University of Michigan. I am a member of the American Academy of Pediatrics. I am in private practice as a pediatrician, and am medical director at the Boys Industrial School in Lancaster, Ohio.

My opinion of "hard core Pornography" as judged by contemporary standards, would be movies, depicting sexual acts; pamphlets and cartoons, of the "Maggie and Jiggs" type and anything drawn or written or done for pure erotic arousal.

I do not feel the handbook is pornography. Although my personal moral ideas do not correspond to the authors in relation to her promiscuity, I feel she has given a valid and valuable picture of her feelings and desires. It is extremely difficult even as a physician to obtain information such as this. Certainly a great deal more information of this would be of great help. I am certain that she is not correct in all her statements. Never the less they obviously reflect her feelings. I find most women are very reluctant to discuss this type of material.

Of course, I can see no evidence that pornography corrupts the morals of a nation. If one wishes to indulge, it should be an individuals choice. I do not feel that porno-

Defendants' Exhibit 54

graphy can in any way be successfully controlled by legislation. It never has been and never will be.

Where there is a will, there is a way—

Sincerely,

J. C. Beesley, M. D.

J. C. BEESLEY, M. D.

Defendants' Exhibit 54, Annexed to Foregoing Affidavit

UNION THEOLOGICAL SEMINARY
Broadway at 120th Street
New York 27, N. Y.

March 14, 1963

Mr. Ralph Ginzburg
The Library
c/o Documentary Books, Incorporated
110 West 40th Street
New York 18, New York

Dear Sir:

I have read your book. My reactions on the book and upon the specific questions you raise are as follows.

In my view, hard-core pornography is writing (or other forms of expression) whose primary intent is to play upon the sexual sensibilities. It aims to stimulate persons excessively and abnormally. It uses one-sided emphases and distortions to arouse the emotions, and to obscure the larger human picture of which its episodes constitute a (distorted) part.

From this definition it will be seen that the *intent* of the writer is a basic factor. And *intent* is an ambiguous concept for the law to try to appraise. But, since the law must proceed through human observers and interpreters, it is impossible to form a judgment upon the end product

Defendants' Exhibit 54

without having one's judgment conditioned by the writer's apparent intent.

Now, as for the *Handbook*, in my judgment the possible value which might be adduced from the clinical-type details so frankly recorded are compromised by their integral association with a view of sexual irresponsibility which leaves the reader dubious about the "balance" of the author.

Sexual wisdom, to be authentic and helpful, is *not* most appropriately conveyed through the experiences of an individual who, judging from the record, is a victim of nymphomania.

My negative reaction to the *Handbook* is not directed towards its frank recording of sexual attitudes and experiences, but rather to the light-handed view of marriage and the sexual relation which is implicit and explicit throughout its pages. Surely it is not to be reasoned that the promiscuity here recorded is a necessary or desirable concomitant in assuring the attainment of compatible sexual satisfaction in a stable marriage.

Finally, were I otherwise satisfied with your interest in publishing the *Handbook*, I would have grave doubts about your use of the present title. As much as the contents of the book itself it makes me suspect your interest in publishing it. I am returning the *Handbook* under separate cover.

Sincerely yours,

Robert F. Beach
ROBERT F. BEACH
Librarian

RFB:al

Defendants' Exhibit 55, Annexed to Foregoing Affidavit

THE WISTAR INSTITUTE
Thirty-Sixth Street at Spruce
Philadelphia 4, Pa.

March 12, 1963

Mr. Ralph Ginzberg
% Documentary Books, Inc.
110 West 40th St.
New York 18, N. Y.

Dear Mr. Ginzberg:

I have read "The Housewife's Handbook of Selective Promiscuity" which you sent me upon request of William Purcell. Pursuant to your request I will reply to the questions asked in your covering letter:

1) I hold the B.S., M.S., and Ph.D. degrees in Chemistry. I am now doing research in Biochemistry, specializing in fat metabolism.

My current positions are: Member, The Wistar Institute; Assoc. Professor Biochemistry, U. Penna. School of Medicine.

2) My definition of "hard-core pornography" is material written for the *sole* purpose of titillating the reader.

3) The Handbook is not an example of "hard-core pornography" because the prologue and epilogue attempt to define the reasons behind the writing of the book. The reasons are justifiable.

4) I cannot judge the values to society of this book from the same pinnacle of expertise as the reviews of Bryan and Frumkin, which you sent with the book. The book is one sample of an attempt to point out the fallacies behind some of the popular misconceptions and taboos. I am not well enough acquainted with this area of writing to state whether this is one of the better attempts in this direction, but I doubt it.

Sincerely yours,

David Kritchevsky
DAVID KRITCHEVSKY

DK:rb

Defendants' Exhibit 56, Annexed to Foregoing Affidavit

RICHARD I. DARNELL, M. D.
North Main Street
New Hope, Penna.

New Hope 2803

March 18, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

Your publication by Rey Anthony has been received and read, along with the enclosed letter and reprints of criticisms of the book.

This letter is in response to your request for opinion regarding the handbook. I have been a physician for twenty-three years engaged in family practice, and have been in this small community, with a high percentage of personal adjustment problems among my patients, for the past twelve years. I have been acquainted with Writers like Schiddel (Devil in Bucks County and Scandal's Child) and do a fair amount of reading and conversing for both professional and personal information and enjoyment. I am unable to define obscenity and hard-core pornography as requested, since contemporary literature seems to have much more freedom of expression than was true twenty-five years ago.

I cannot question the judgment or the standards of the reviewers whose remarks have been reprinted and included with the volume. However, only the latter part of the handbook appears to justify the praise embodied in the criticisms. The earlier part, which is the bulk of the book, and which purports to be an autobiographic recital, ap-

Defendants' Exhibit 57

pears to me poorly written, so poorly in fact that the criticisms seem not to match the quality of the writing at all. I wonder if the criticisms quoted applied to another book or to only a portion of this handbook. This type of material is important and desirable in understanding personal problems in people of diverse background. Such material however, can be presented in an interesting fashion with skill that is not apparent in this volume.

In summary, I find fault not with the content of the volume "Handbook," but with the poor quality of writing in which important information is presented. I cannot match the book with the criticisms purporting to be of it.

Sincerely yours,

Richard I. Darnell, M. D.
RICHARD I. DARNELL, M. D.

RID:ar

Defendants' Exhibit 57, Annexed to Foregoing Affidavit

Palo Alto
California
29 January 1963

TO WHOM IT MAY CONCERN:

This country was founded by people who feared and despised humanity, and who framed laws and established mores which expressed this fear and despite.

Many of their descendants still fear and despise humanity, and would protect their own anxiety by constraining all to their way of thinking.

The rest of us think that, with all its faults, humanity is the *only* good and beautiful thing we have—and we claim the *right* to our belief.

We also claim the right *to describe and to proclaim* what it is to be human, and good, and beautiful, in order that others, who may have been denied this knowledge, may come to know.

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Those of us who have explored the sickness of this country and who have pondered the true significance of human life have seen how much of that sickness derives from fear and despite of humanity, and that the only way to health and joyous life is through acceptance of our own humanity *in its own terms*.

Rey Anthony is one who has seen the beauty and essentiality of humanity and whose message has been of vital importance to many thousands of Americans.

Let *no one* think that the writings of a Rey Anthony can be dispensed with. This country, in the very moment of its technological supremacy, is failing—in itself and in the world—precisely because of its blindness to and rejection of the *human* condition. This country *needs* people like Rey Anthony *in direct ratio* to its inclination to silence her.

BROOKING TATUM

Brooking Tatum, Assoc. Member, Society for the Scientific Study of Sex Member, Psychoanalytic Education Society of San Francisco Trustee, American Sunbathing Association.

Defendants' Exhibit 58, Annexed to Foregoing Affidavit

1313 Arapahoe Street
Golden, Colorado
28 February 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

The Handbook by Rey Anthony has been read and I am now in a position to make comments on it.

I hold the Doctor of Philosophy Degree in Physics and Mathematics. I have taught Physics in several American

Defendants' Exhibit 58

universities for a total of twenty-seven years. I have published a number of papers in the Physics Journals. I give public lectures along philosophical and scientific lines.

The phrase "by contemporary national standards" used by the Supreme Court in its latest obscenity ruling does not mean very much to me since this "standard" depends upon the particular group. Workers in steel mills commonly use a quite different language than used by say a college faculty. It seems to me that people have changed a great deal in their attitudes toward sex words and the whole subject of sex during the last forty or so years. The general attitude is more wholesome and healthy at present. The feeling seems to be that sex is a normal natural healthy phenomenon which can be discussed as is any other subject. To me pornography which derives from the Greek [pornos], that is, to write about harlots, means something of the sort or close to it. Hence the Bible as well as a great deal of literature of all ages deals with it. The term "hard-core pornography" I suppose means, possibly, writing specially designed with the purpose of exciting the sex appetite. This is highly subjective. What would be called "hard-core pornography" by some individuals would not be so called by others. Also this may depend upon the mood or age of any given person. I do not myself consider the Handbook as "hard-core pornography". It would undoubtedly be so considered by some and not so by others.

The Handbook has somewhat the same value as do many others which deal with case histories which involve the sex life of individuals. I am familiar with many such books which are generally available in department and book stores. In any area of knowledge or human endeavor the better one understands the better he is able to deal with it. Knowledge is always better than ignorance in the sexual sphere as anywhere else.

Sincerely,

PAUL F. BARTUNEK.

Defendants' Exhibit 59, Annexed to Foregoing Affidavit

HARVARD UNIVERSITY
Department of Social Relations
Emerson Hall
Cambridge 38, Massachusetts

February 15, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Mr. Ginzburg:

My views on your disagreement with the Postmaster General, I fear, would not be relevant or helpful.

As I see it, frank discussions of the sexual predicament of human beings in our society are needed, and are not pornographic—provided they “tell all.” By “all” I mean that the moral, psychological, social, religious, humanitarian, complications of sex are as important as the biology. Our society being what it is, no normal life is free from these non-biological aspects of sexual life. To take the biological events out of this context is to run the risk of stimulating only physical interest. It is commercially profitable to do so, but whether it is a genuine public service is doubtful.

Sincerely yours,

(Signed) Gordon W. Allport
GORDON W. ALLPORT

Defendants' Exhibit 60, Annexed to Foregoing Affidavit

23 February 1963

At the request of Mr. Ralph Ginzburg, I have read "The Housewife's Handbook on Selective Promiscuity," by Rey Anthony, 7th printing, published by Documentary Books, and would like to offer the following comments on it.

First, as to my professional standing, I am a graduate librarian with a Master of Library Science degree from the University of California and over five years professional experience. I have also been engaged for the past five years in compilation of the first book-length bibliography on sex in literature and its censorship, so I am more familiar than the average individual, and indeed the average librarian, with the literature, concepts, and history of this field.

As for the book in question, although it is sexually explicit, I do not feel it should be ranked as pornography. It appears to be an honest and sincere attempt by the author to perform a socially valuable service and to present for consideration honest ideas and actual human experiences, and bears none of the earmarks of the pornographer. I can see, however, how a superficial consideration of it might lead the thoughtless to so view it, but I do not see how the author could have accomplished her purpose in any other way. It is indeed unfortunate that the sexual aspect of our lives should be so hedged about with fears, frustrations, and State sanctioned and enforced ignorance. If this book had been written about almost any other human function, including murder, its explicitness would have aroused little or no comment and certainly no governmental hostility.

As to whether it transgresses the current standard of explicitness, I do not feel qualified, nor do I feel anyone is qualified, to so judge in our pluralistic society. I doubt very much whether there is any single current "standard."

Defendants' Exhibit 61

The United States extends for thousands of miles in each direction, and includes people of every racial, political, national, moral, philosophical, cultural, educational, religious, and ethical persuasion and hue. I do not see how anyone can validly presume to predicate any such standard, most especially with the degree of precision necessary to the law.

I feel that the suppression of this book would be a violation of the basic democratic principle of free expression, and would moreover constitute a tragic diminution of the total body of knowledge available to mankind in its search for understanding of itself.

(Signed) Robert R. Knepper
ROBERT R. KNEPPER
1027 W. 47th St.
Los Angeles 37 Calif.

Defendants' Exhibit 61, Annexed to Foregoing Affidavit

Arnold Maddaloni
99 Clinton Avenue
Stamford, Conn.

Mr. Ralph Ginzburg
Documentary Books, Inc.
110 West 40th Street
New York 18, N. Y.

Dear Ralph Ginzburg:

I have learned of your indictment by a Philadelphia Federal Grand Jury based on the presumption that the book, *THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY*, by Mrs. Rey Anthony and published by Documentary Books, Inc., of which you are editor and publisher, is "obscene".

Defendants' Exhibit 61

As one who has devoted twenty-five years in the study of the psychology of literary obscenity and sexual science, and contributed several scientific papers on psychoanalysis and psychology, I would like to respond to this indictment.

1. I have carefully read this book and found it to be a sincere, honest and valuable case history of the sexual and psychological growth of one woman. The writer is an exceptional person for writing a lucid and courageous book about the sexual experiences in her life. To argue, as some people may, that this book is "hard-core pornography" is to argue that life itself is pornographic. To believe that this book is evil, or could have an evil influence on the mind of an adult reader, is to indulge in the worst kind of primitive emotionalism possible. It would be more objective and scientific to believe (a) that any suppression of this book on the ground that it could corrupt the sexual life of the reader is an illusion and, (b) that it is a dangerous violation of our constitutional guarantees as expressed in the historical controversies which led to the adoption of the First Amendment.

2. The indictment on the ground that this book is "hard-core pornography" because it does not fit into the Supreme Court's ruling of "contemporary community standards" as to what is not obscene points to the inadequacy of this kind of vague legal definition. If Rey Anthony's book is legally declared to be "hard-core pornography", then it is imperative for us to seriously review and reevaluate what is meant by "contemporary community standards". The most reliable information available at present are the studies made by Kinsey. Mrs. Anthony's book is an insightfully penetrating and educational bomb that explodes the prevailing myths about human sexual life. It should be accepted as a serious autobiography and

Defendants' Exhibit 61

one that may very well indicate the prevalent "off scene" experiences of human relations.

3. I am naturally quite concerned about the problem of censorship in the United States and its relationship to our constitutional guarantees. Some of our courts have professed to be certain of what is literary obscenity, but it is interesting to note that they never could determine the degree of its danger for a legal test. The problem before us is: where and how can we draw the line between decency, permissible indecency, and criminal indecency? As a matter of scientific speculation, do we really try to understand this difference, and how to measure it? The use of synonyms which do not define the offense in overt and objective terms leaves the law to be interpreted according to the sexual psychology of the complainer, the prosecutor, and the judge. In an article entitled JUDICIAL CENSORSHIP OF OBSCENE LITERATURE, published in the Harvard Law Review, Leo M. Alpert concluded that: "There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it * * * the law, in its ponderous generalities, still remains as a weapon of censorship with the only safeguard the mercy of a judge." It would seem to me that the old Roman adage that "where the law is uncertain there is no law", should still hold.

4. If obscenity is so imponderable that we cannot arrive at an objective definition of it, then it is purely a subjective quality, a matter of our emotions and feelings. It has never been, as in any other criminal offense, defined in terms of any visible or tangible quality. Consequently, we have never been able to establish a uniform criteria of guilt by which a literary performance, which is alleged to be obscene, can be distinguished from another which is not. There is no demonstration of an actual objective

Defendants' Exhibit 61

intangible or tangible force called obscenity. Hence, there is no certainty whatever in the judicial criteria of obscenity. The illusion resides in the act of externalizing what is primarily a subjective condition. When we make this illusion the basis of sex censorship, on the presupposition that there can be a universally accepted theory that a real objective force for evil inheres in and emanates from literature or art, we have entered into the misty and superstitious area of witchcraft. The illusion becomes even more startling when we realize that the basis for the obscenity statute is wholly independent of the existence of any difference of feeling as to where the line is to be drawn between the criminally dangerous and the legally harmless degree of that "obscene" force.

The law is based on the illusion that obscenity in a book "appeals to prurient interests." We must remember that prurience involves longing, desire, propensity, something existing entirely *within* the person as lust. Although obscenity may exist in the contemplating mind, this is not a crime, and not necessarily prurient. Even if we assume that our thoughts can be prurient, can we, under our constitution, punish an undesirable state of mind, although there has been no resultant actual or material injury to anyone? How can we punish any mere psychologic crime? To penalize anyone for mailing a book because some unknown and hypothetical person may become more conscious of his sexual feelings by association is a modern form of witchcraft.

The extension of free speech into printing assumes that opinions as such are not to be censored. The field of opinion is inviolable and should not be suppressed on the supposition of their ill tendency. To suppress Mrs. Rey Anthony's book would be a violation of the free speech and free press guarantee of the First and Fourteenth amendments.

ARNOLD MADDALONI.

Defendants' Exhibit 62, Annexed to Foregoing Affidavit

2112 Rubye Drive
Antioch, California

February 22, 1963

Mr. Ralph Ginzburg
Editor & Publisher
Eros Magazine, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

I have just finished reading *The Housewife's Handbook on Selective Promiscuity* and am prepared to offer some opinions about this book. First, allow me to briefly describe with what background these opinions are offered.

I received my A. B. degree with honors from the University of California at Berkeley and am a permanent member of Alpha Gamma Sigma, the California Junior College Honor Scholarship Society. For the past five years I have been a successful and respected public school teacher and am considered to be a leader in my district in the movement to improve and modernize mathematics curricula and instruction. Since becoming a teacher I have been the recipient of three National Science Foundation scholarships to do graduate study in this area. The most recent of these awards will provide support enabling me to continue this work on a full-time basis for the entire 1963-64 academic year.

The *Handbook* in my opinion is not pornographic. As I interpret our national standards, pornographic material has no social value or literary worth. Its basic characteristic supposedly is its tendency to weaken or destroy morality and social responsibility. The *Handbook* certainly does not fit such a description.

Defendants' Exhibit 62

No expert on what constitutes great literature, I am able to recognize superior writing ability, and Mrs. Anthony, the *Handbook's* author, writes with style and humor which a good many already popular authors would do well to equal.

The real value of the book, however, rests in its important educational aspects. As a father and teacher of young people I am especially impressed with how important a free flow of ideas is to the development and maturation of the young mind. One of Mrs. Anthony's main objectives in writing this book I feel was to make this point. Her description of her own developmental years shows the effect of keeping youngsters in ignorance of the facts. The language she employs is the language used secretly by most adolescents. The events she describes occur and have occurred among the young of every generation. By continuing her descriptions into her own adult life, the reader is shown the result of at least one such childhood.

Such a book has significant social value for both the expert in the theory of human relations and the amateur practitioner, the lay reader. Since education creates understanding, and understanding improves morality and social responsibility, any book which relates fact and stimulates serious thought, as this book does, cannot be considered worthless or pornographic.

Sincerely,

Robert K. Oldenburg
ROBERT K. OLDENBURG

Defendants' Exhibit 63, Annexed to Foregoing Affidavit

February 25, 1963.

Dear Mr. Ginzberg:

1. My training as a research worker in the field of medicine has included a B.S. in Biology from Rensselaer Polytechnic Inst., Troy, N. Y., MM. in Pharmacology from Univ. of Calif. at San Francisco, and a Ph.D. in Pharmacology from Northwestern U. Medical School in Chicago, Ill. I am at present a Research Associate in Experimental Medicine at the Univ. of Vermont, Burlington.

2. In my opinion, the intent of any written or printed matter as far as it can be ascertained should be the criterion as to what is "hard-core pornography".

3. In my opinion the "Handbook is not such hard-core pornography" as its primary purpose seems obviously not to excite but to convey information.

4. This information obviously is not easily obtained and hence is of great value.

Very truly yours,

H. C. HERRLICH.

Defendants' Exhibit 64, Annexed to Foregoing Affidavit

DR. HAROLD A. BLACK
Dentist
7267 South Exchange Avenue
Chicago 49, Illinois

Mar. 1, 1963.

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Sir:

Both my wife and I have just finished reading the Housewife's Handbook of Selected Promiscuity by Rey Anthony and would like to go on record as stating that in, our opinions, this book is not pornographic nor obscene. In fact, I would go so far as to say it should be *must* reading for married couples. Had my wife and I been able to read this early in our marriage, rather than our twentieth year, perhaps some of the problems of good sexual relations would not have come up.

There seems to be an inability to speak frankly about sex practices and modus operandi in our society, despite the very basic aspect of our sexual lives. Physicians and clergy were less than enlightening on the subject. Friends and relatives were under the same misapprehensions as my wife and I were. Since both of us came to the marital bed without prior experience, our first years were fumbling, groping attempts to find sexual gratification for both partners, hampered by the usual inhibitions and taboos.

There seem to be many idealized or romanticized concepts of sexual relations which are found in literature or movies, which concepts do not coincide with actual, real life occurrences. The debunking of these fallacious ideas

Defendants' Exhibit 65

has been long overdue, and I thank Mrs. Anthony for so doing. Three huzzahs and sincere thanks to Mrs. Anthony for speaking frankly, honestly and courageously. Perhaps I cannot condone the "numerical" aspects of her sexual life, and her rather casual references to her lovers, but this in itself does not render a book pornographic or obscene. This would, if it were pornographic, remove much literature from the bookshelves of the world.

In dealing with this unfortunately taboo subject of sex, if some of our supposedly enlightening texts were written in understandable language, and sexual practices, and yes methods, were made clearer, we might not today be drifting in a morass of half truths, misconceptions and frustrations. This book should not be suppressed; it should be publicized and be seen by all.

Sincerely,

Harold A. Black

HAROLD A. BLACK, D.D.S.

Defendants' Exhibit 65, Annexed to Foregoing Affidavit

HERBERT G. HAMILTON
1371 Commonwealth Ave.
Allston, Mass.

4 March 1963

Dear Mr. Ginzburg,

Thank you for your copy of *The Housewife's Handbook on Selective Promiscuity*.

I am sorry to say that I cannot act as a "high credibility source", on whether the HANDBOOK is or is not "hard-core pornography". My primary interest and training is in photography as an art form. For quite a while, however, I have had an interest in the artistic merits of so called

Defendants' Exhibit 65

"pornography" and "erotic realism" in sculpture, painting, writing, motion and still photography. I have included a bibliography of references (with some comments in parentheses) which may be of aid to you in fighting this travesty of justice to which you are being subjected.

Social scientists are continuously inserting such phrases as " * * * other factors are at work and must be examined before the situation can be properly examined". Schramm, W. ed. *The Process and Effects of Mass Communication*. Urbana, Ill., University of Illinois Press, 1954. p. 95). Social science (basically a pseudo-science anyway) has not been able to determine with any accuracy the standards of even a small sample of people in a relatively confined area (except in the most elementary and simple of experiments). It is my opinion that "contemporary national standards" cannot be measured, or even adequately guessed at, on such a complex topic as "pornography".

Although I do not believe the HANDBOOK is pornography I would like to point out a factor which may make it *appear* so. The prose style is very unpolished. This is to be expected in a diary but brings up immediate associations with coarseness. I admire the publisher for not trying to alter this basic honesty of approach, and take on the burden of a rather tiresome prose style.

Pornography depends primarily on fantasy. The HANDBOOK is so realistic that it almost appears to be a clinical report. It is for this reason that I don't consider it pornography.

The following are quotes from my wife in the discussion we had about the HANDBOOK:

"I wish that when I was so darn innocent I had gotten hold of a book like this".

"I wish I had kept a diary like this and written down some of the reactions I had with Andrew because it was quite a traumatic experience".

Defendants' Exhibit 65

"I would have been embarrassed about this book at one time but now I'm not. It's a matter of my maturing and changing attitudes".

"* * * down to earth approach but not well written".

"The approach seems to be what a mother should tell".

"It's said in the terms that children use".

"It's just a forthright presentation * * *"

"Obscene is a word that covers a very broad category that really doesn't cover anything".

My very best wishes for a successful outcome for you in the courts.

Sincerely yours,

Herbert G. Hamilton
HERBERT G. HAMILTON.

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th St.
New York 18, N. Y.

BIBLIOGRAPHY

The Holy Bible. Thomas Nelson & Sons, New York, 1952, "The Song of Solomon", pp. 703-708.

Costler, A. & Willy, A. (ed. Norman Haire), *Encyclopaedia of Sexual Knowledge*, Eugenics Publishing Co., New York, 1940. pp. 223-224.

(The pages noted bear a remarkable resemblance to the "erotic realism" of Mrs. Anthony's book.

Defendants' Exhibit 66

This is even more remarkable considering the "Encyclopedia" was published 23 years ago and was sent thru the mails.)

Lewinsohn, Richard. *A History of Sexual Customs*, Harper & Bros., New York, 1958.

Greenwald, Harold. *The Call Girl*, Ballantine Books, New York, 1958.

Chamdos, John. *A Guide to Seduction*, Frederick Muller Ltd., Great Britain, ().

Li Yu. *Jou Pu Tuan, A Seventeenth Century Erotic Moral Novel*, Grove Press, Inc., New York, 1963.

(The above two books purchased from Doubleday store on 5th Ave. near 52d St., New York, N. Y.)

Watts, Alan W. *Nature, Man and Woman*, Pantheon Books, Inc., 1958.

(" * * * a new approach to sexual experience * * * ")

Mead, Sheperd. *The Big Ball of Wax*, Ballantine Books, New York, 1954.

See also: Eichenlaub, John E. *The Marriage Art*, Dell Publishing Co., Inc., New York, 1961.

Defendants' Exhibit 66, Annexed to Foregoing Affidavit

February 28, 1963

Mr. Ralph Ginzburg
% Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

This is in answer to your request for a statement concerning our opinions on the quality and morality of the book entitled "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony.

Defendants' Exhibit 66

The book is mistitled. Why not use a title representative of the subject matter such as: *The Autobiography of an Intelligent Tramp*.

The book is not "hard-core pornography" or any other kind of pornography. It should, in our opinion, be unlawful to print it for general distribution however without an inclusion which analyzes the worth of the book and identifies the character and pathology of the author. This should be required to prevent the young and inexperienced from assuming *a priori* that the behaviour of the author was acceptable or lawful.

It seems a shame that after such a penetrating and superb account of her sex life that this highly intelligent Mrs. Anthony did not conclude her book with an attempted explanation of her psycho-sexual immaturity. Also a shame that she did not use this same brain, and gift of God, to point out the obvious: namely the chaotic consequences if her behaviour were repeated by a really significant fraction of society.

The *only* message we could detect in this book was Mrs. Anthony's recommendation that a more satisfactory vocabulary of sex be taught and used openly. With this we heartily agree. But, it is not adequately emphasized that this is needed most among decent honorable people and that our society is in error to encourage it only in ego-centric wanton's such as Mrs. Anthony and some of the associates she describes.

Part 2—Entitled "Miscellaneous Concepts"—contains grains of sense here and there but these are lost as one

141a

Defendants' Exhibit 67

soon realizes the author is merely demonstrating her admitted skill at mental masturbation.

Sincerely,

A. Kandel
ALEXANDER KANDEL, Ph.D.
6625 Newburgh Road
Evansville, Indiana

P. M. Lish
PAUL M. LISH, Ph.D
531 S. Benninghof Ave.
Evansville, Indiana

**Defendants' Exhibit 67, Annexed to Foregoing
Affidavit**

SPRINGFIELD COLLEGE
Springfield 9, Mass.

April 2, 1963

Mr. Ralph Ginzburg
c/o Documentary Books, Inc.
110 West 40th Street
New York 18, New York

Dear Mr. Ginzburg:

Our Library has just received Rey Anthony's *The Housewife's Handbook On Selective Promiscuity*. You asked for certain bits of information.

1. I have a Bachelor of Science, a Master of Arts, and a Ph.D. degree in psychology. I am currently an Associate Professor of Psychology, Chairman of the Department of Psychology, and Director of the Graduate Division of Guidance and Personnel Services at Springfield College. I am a member of the Massachusetts Psychological

Defendants' Exhibit 67

Association, the New England Psychological Association, the American Psychological Association, and the American Academy of Psychotherapists.

2. I really do not know what "by contemporary national standards" hard-core pornography consists of. I have not myself seen anything which I consider to be hard-core pornography, but I should imagine it to be those products which have as their avowed purpose the sexual excitation of the reader or viewer.

3. I do not consider *The Housewife's Handbook On Selective Promiscuity* to be hard-core pornography. Its purpose does not appear to be sexual excitation of the reader. Instead, it seems clearly to me to be a didactic piece of work.

4. I think that the book has potential value to society inasmuch as it is a frank expression of experience, which to one degree or another, must certainly be duplicated by many persons in our society and can consequently help people to understand one another and find support. More importantly, it teaches many much needed lessons about sexual acceptance, toleration and practice in a gentle form of indirect tuition that is much more persuasive than lectures delivered on the subject.

Sincerely,

Henry Paar

HENRY PAAR

Chairman, Psychology Department

HP:rc1

Defendants' Exhibit 68, Annexed to Foregoing Affidavit

March 28, 1963

Mr. Ralph Ginzberg
c/o Documentary Books
110 West Fortieth Street
New York 18, New York

Dear Mr. Ginzberg:

You have asked me an opinion of Rey Anthony's book *The Housewife's Handbook on Selective Promiscuity*. I assume you wish a professional appraisal. I am an Assistant Professor of History at Colorado State University. I hold a BA and MA from the University of Virginia and a Ph. D. from the University of California. I regard myself as a social historian concerned with studying the manners and mores of America and although I specialize primarily in Early American history, I feel it is my duty to keep up with the whole sweep of our past, especially in this field of society, manners, and morality. I have, of necessity, read moderately widely in this field.

The court has held that hard core pornography must be judged "by contemporary national standards." Yet there is the problem of such standards varying from locality to locality and group social group to social group. One group ought not, whether it is a minority or a majority, be entitled to deprive another of its right to either expression or information. "Contemporary national standards" can only mean that which is acceptable in the United States. Obviously this book is acceptable to many people. It is certainly not "hard-core pornography" in the sense in which E. and P. Kronhausen so ably define the term in their *Pornography and the Law*. It would have been in the nineteenth century, but not so in the mid-twentieth. Its careful avoidance of obscene language, its avoidance of obscene detail, and its lack of the "obscene structure" as outlined by the Kronhausens prevents it from becoming

Defendants' Exhibit 69

so. I am almost tempted to describe the character of the book as "clinical" except that it uses language which is intelligible to the educated layman. I cannot see this work as an obscene or pornographic one. It is less so than many works which have been accepted today.

The *Handbook* actually could be of service to society in the United States. It provides an enlightened attitude toward sex in lay terms. It should impart needed information to segments of society which are denied this information. One need not accept every statement in a work to recognize that such works have value as a whole. If this were the case most accepted works would have to be discarded.

Sincerely,

CARLOS R. ALLEN, JR.,
Assistant Professor of History,
Department of History and Political
Science,
Colorado State University,
Fort Collins, Colorado.

Defendants' Exhibit 69, Annexed to Foregoing Affidavit

HAVERFORD COLLEGE
Haverford, Pa.

March 28, 1963

Mr. Ralph Ginsburg
Editor and Publisher
110 West 40th Street
New York 18, New York

Dear Mr. Ginsburg:

I have read *The Housewife's Handbook on Selective Promiscuity*. You ask for my judgment as to whether it is "obscene." Although a clinical psychologist, conversant

Defendants' Exhibit 69

with much clinical literature, I scarcely qualify as an "expert" of what is "obscene." To me, what is "obscene" depends both on the motivation of the author who writes a book and on the motivation of the reader who reads such a book.

From my viewpoint, the book is not obscene. In fact, I found it to be one of the most enlightening clinical case studies of a woman's reactions to sexual experience that I know of in the professional literature. I profited from reading this book and I would strongly protest any interference by governmental agencies to ban the distribution of such a work to professional persons. Certainly the content of the book is no more "pornographic" than other materials I read in professional literature and these materials have never yet been considered obscene.

The opinion above does not, of course, indicate that I agree with many of the author's viewpoints. I think such a work states as facts much that is only opinion. Certainly, I do not condone the thinly veiled attempt to defend, if not absolve herself, from what I would call very "unselective" promiscuous relations. Other portions of the book are equally objectionable, but when the work is taken as a whole, I still feel it to be a valuable and useful document of one woman's experiences.

But I must confess I am quite ambivalent about the distribution of the book to the general public. Certainly the book should be available to professional persons who must deal with persons such as the authoress and the experiences she relates. Professional people have the information (or know when such information is lacking) to evaluate the book's message critically. If I were the publisher of such a work, I would feel my responsibility quite heavily in deciding how to market the book and to what audience I would address my advertising. The singular focus on sexuality, mitigated only by the "idealized" (fictionalized?) relation at the conclusion of the book, casts

Defendants' Exhibit 69

interpersonal relationships into a mold only too readily portrayed in contemporary literature and drama. I have become seriously concerned about the possible effects of such recurring themes on the youth I must teach and I wonder how much such themes stimulate and encourage sexual and other forms of impulse expression long before such forms of expression can be integrated healthfully into our current social framework. I would not want my children to read this book. The book is for adults but unfortunately one cannot limit the distribution of books to adults as one can limit the attendance of children to movies and to the theater. This to me is the serious dilemma and ethical issue such a book raises.

Since I feel such a book should be limited to more professional persons, I hope the Post Office is wise enough not to make a court case about the book which would only advertise it to a much larger public and I hope you, as the publisher, will search your conscience and seek the wisdom of more experienced professional persons than I about how to market such a book so as not to add to the current overemphasis and exclusive centering on sexual expression that seems to dominate so much of our current youthful culture.

Sincerely,

Douglas Heath, Chairman
DOUGLAS HEATH, Chairman
Department of Psychology

DH:hw

I do not give my permission to have any portion of this letter used for advertising or promotional purposes.

cc Postmaster General, Post Office, Washington, D. C.

**Government's Motion to Strike Affidavit and Exhibits
Appended to Defendants' Motion to Dismiss Indictment**

The United States of America, by its attorneys, Drew J. T. O'Keefe, United States Attorney in and for the Eastern District of Pennsylvania, and Isaac S. Garb, Assistant United States Attorney for said District, moves the Court to strike defendants' affidavit and exhibits appended to defendants' Motion to Dismiss Indictment and as grounds therefore states as follows:

1. On or about the 17th day of April, 1963, defendants did present a certain Motion and Order for Dismissal of certain Counts of the Indictment in the above-captioned matter pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

2. In conjunction with defendants' Motion, defendants did append an affidavit and 69 exhibits, raising certain questions of fact which are not presently a part of the record of this case.

3. Defendants have asked that the said questions of fact outside of the record be considered by the Court in determining whether the said Counts of the Indictment should be quashed.

4. In determining whether or not an Indictment may be quashed the Court may consider only the Counts of the Indictment themselves to determine, as a question of law, whether or not they are self-sustaining.

5. The Exhibits appended to defendants' Motion purport, in effect, to be a testimony of various persons, whose testimony has not been subjected to cross-examination by the Government but whose testimony the defendants request the Court to consider.

Stipulation, Dated May 8, 1963 and Order Approving Same

6. There has been no ground work laid by the defendants for the purported testimony of the persons named in defendants' Exhibits and therefore, no showing that these persons are qualified to testify with regard to current community standards.

/s/ Drew J. T. O'Keefe,
DREW J. T. O'KEEFE,
United States Attorney.
ISAAC S. GARB,
Assistant United States Attorney.

**Stipulation, Dated May 8, 1963 and Order
Approving Same**

AND NOW, to wit, this 8th day of May, 1963, it is hereby stipulated by and between Drew J. T. O'Keefe, United States Attorney in and for the Eastern District of Pennsylvania, J. Shane Creamer, Esquire, and Isaac S. Garb, Esquire, Assistant United States Attorneys, attorneys for the United States of America, and David I. Shapiro, Esquire, Sidney Dickstein, Esquire, and Norman A. Oshtry, Esquire, attorneys for defendants, and Ralph Ginsburg, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc., which stipulation shall be in lieu of defendants' motion for bill of particulars and which stipulation shall be as follows:

1. Defendants' motion for bill of particulars is hereby withdrawn.
2. A copy of the alleged non-mailable material referred to in Counts 1 through 3 of the Indictment is annexed to this stipulation as Exhibit "A".
3. The advertising material annexed hereto as Exhibit "A" is not in and of itself alleged to be obscene under 18

Stipulation, Dated May 8, 1963 and Order Approving Same

U. S. C. § 1461, but it is the Government's theory of the case that it advertised where and how allegedly non-mailable material could be obtained.

4. A copy of the advertising material referred to in Counts 4 through 6 of the Indictment is annexed to this stipulation as Exhibit "B".

5. The advertising material annexed hereto as Exhibit "B" is not in and of itself alleged to be obscene under 18 U. S. C. § 1461, but it is the Government's theory of the case that it advertised where and how allegedly non-mailable material could be obtained.

6. A copy of the advertising material referred to in Counts 7 through 10 of the Indictment is annexed to this stipulation as Exhibit "C".

7. The advertising material annexed hereto as Exhibit "C" is not in and of itself alleged to be obscene under 18 U. S. C. § 1461, but it is the Government's theory of the case that it advertised where and how allegedly non-mailable material could be obtained.

8. The Indictment charges that the alleged non-mailable material, "The Housewife's Handbook of Selective Promiscuity," referred to in Counts 11 through 16 of the Indictment is obscene when considered as a whole.

9. The Indictment charges that the alleged non-mailable material, "Eros" Vol. 1, No. 4, 1962, referred to in Counts 17 through 22 of the Indictment is obscene when considered as a whole.

10. The Indictment charges that the alleged non-mailable material, "Liaison" Vol. 1, No. 1, 1962, referred to in Counts 23 through 28 of the Indictment is obscene when considered as a whole.

11. In all counts of the bill of Indictment in which "The Housewife's Handbook on Selective Promiscuity" and

Stipulation, Dated May 8, 1963 and Order Approving Same

"Eros" themselves or the advertisements pertaining thereto are involved, the defendants did knowingly mail or cause to be mailed the materials set forth in those counts on the dates set forth, fully knowing the contents of said materials.

12. In those counts of the bill of Indictment pertaining to "Liaison" itself, the defendants did knowingly mail or cause to be mailed the said materials on the dates set forth in those counts.

13. In those counts of the bill of Indictment pertaining to the advertising material relating to "Liaison" the defendants did knowingly mail or cause to be mailed the materials set forth in those counts on the dates set forth, fully knowing the contents of said materials.

14. The alleged non-mailable materials referred to in all counts of the Indictment are hereby considered a part of the Indictment as though fully set forth therein at length.

DREW J. T. O'KEEFE,
United States Attorney.

J. SHANE CREAMER,
Assistant United States Attorney.

ISAAC S. GARB,
Assistant United States Attorney.

DAVID I. SHAPIRO
SIDNEY DICKSTEIN
NORMAN A. OSHTRY
RALPH GINZBURG,
DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC.,
LIAISON NEWS LETTER, INC.,
By RALPH GINZBURG.

Approved and Ordered Filed This
8th Day of May , 1963.
/s/ RALPH C. BODY,
J.

**Order, Dated May 17, 1963 Striking Affidavit and
Exhibits Annexed to Defendants' Motion to
Dismiss Indictment**

AND NOW, to wit, this 17th day of May, 1963, in consideration of the motion of the United States of America to strike the affidavit and sixty-nine exhibits appended to defendants' motion to dismiss the indictment and also in consideration of oral argument on this day heard thereon, it is hereby

ORDERED that the said affidavit and sixty-nine exhibits annexed by defendants to their motion to dismiss the indictment are hereby stricken from the said motion.

/s/ RALPH C. BODY,
J.

May 17, 1963.

**Order, Dated May 23, 1963 Denying Defendants'
Motion to Dismiss Indictment**

AND NOW, this twenty-third day of May, 1963, upon consideration of the motion of defendants, Ralph Ginzburg, Documentary Books, Inc., Eros Magazine, Inc. and Liaison News Letter, Inc., and upon consideration of oral argument and briefs of respective counsel, IT IS ORDERED that the motion to dismiss be, and the same is hereby DENIED.

/s/ RALPH C. BODY,
J.

Excerpts from Testimony

* * *

[7] Mr. Shapiro: Yes, we propose to stipulate that the defendants did knowingly mail or cause to be mailed "Liaison," fully knowing the contents thereof, and we will stipulate that issue on the record.

I am doing that in order to try to speed up the trial.

Do you have any objections to that stipulation, Mr. Creamer?

[8] Mr. Creamer: I have no objection, Your Honor, but I reserve the right to put on any evidence as to intent that I feel fit to put on.

* * *

[13] GOVERNMENT'S EVIDENCE

Mr. Creamer: Mr. Rodgers, will you take the stand, please.

ARTHUR J. RODGERS, JR., having been duly sworn, was examined and testified as follows:

Direct examination:

The Witness: Your Honor, I would like to call your attention to Postal Manual Section 114.451.

The Court: What is it?

The Witness: I can not give information unless directed so by the Court.

The Court: You are directed to give that information.

By Mr. Creamer:

Q. By whom are you employed, Mr. Rodgers? A. United States Post Office Department.

Arthur J. Rodgers, Jr.—for Government—Direct

Q. And in what capacity are you employed? A. Postmaster.

Q. And of what are you postmaster; where is the location of the post office? A. I am postmaster of Blue Ball, Pennsylvania, in Lancaster [14] County.

Q. Did you receive a communication from Eros Magazine, Incorporated? A. Yes, I did.

Q. Did you bring that document with you today? A. Yes, I did.

Q. May I please have it.

(The witness handed a paper to Mr. Creamer.)

Mr. Creamer: If Your Honor please, I would like to have this marked for purposes of identification as Government's Exhibit No. 1.

The Court: Show it to defense counsel.

Mr. Creamer: Yes, sir.

The Court: I think the process we will follow, he will identify whatever you have.

Take it over to your table and look at it and then we will question the witness on it because there is no point in having both counsel come up each time.

Mr. Shapiro: Thank you, sir.

The Court: Because you will want to show it to your colleague, whatever it may be.

Mr. Creamer: Sir, would I show it before I have it marked, or after?

The Court: No, identify it first.

[15] Mr. Creamer: Thank you.

The Court: Merely say what it is, a letter from "A" to "B" or book, or whatever it is.

(Letter from Eros Magazine, Incorporated, to Postmaster, Blue Ball, Pennsylvania, dated October 18, 1962, was marked Exhibit G-1 for identification.)

Arthur J. Rodgers, Jr.—for Government—Direct

By Mr. Creamer:

Q. I show you Government's Exhibit No. 1. To whom is it addressed? A. Postmaster of Blue Ball, Pennsylvania.

Q. And what date appears on the letter? A. October 18, 1962.

Q. Did you receive this letter in the course of your business as postmaster? A. Yes, I did.

Mr. Creamer: If Your Honor please, I offer to place in evidence Government's Exhibit No. 1.

Mr. Shapiro: We have an objection on the grounds of relevance, Your Honor.

The Court: Objection?

Mr. Creamer: If Your Honor pleases, if you would hear me on relevancy, the contents of this letter will go as to the intent of Mr. Ginzburg and Eros, Incorporated, as to the dissemination of this material.

[16] The Court: Who signed the letter?

Mr. Creamer: It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.

The Court: And your objection is—

Mr. Shapiro: It is in no way relevant to the particular issue or publication upon which the defendant has been indicted and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.

The Court: Anything else to say?

Mr. Creamer: If Your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post

Arthur J. Rodgers, Jr.—for Government—Direct

office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.

The Court: Admitted.

Mr. Creamer: Thank you, sir.

(Exhibit G-1 received in evidence.)

By Mr. Creamer:

Q. Would you kindly read the first paragraph of that letter. A. "After a great deal of deliberation, we have decided [17] that it might be"—

The Court: Will you keep your voice a little higher? The fans are interfering with the acoustics in here.

The Witness: "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city."

By Mr. Creamer:

Q. Did you reply to this communication? A. Yes, I did.

Q. Do you have your communication with you? A. No, I don't.

Mr. Creamer: No further questions.

Mr. Shapiro: No questions.

Mr. Creamer: Thank you, Mr. Rodgers. That's all.

Mr. Creamer: Take the stand, please, Miss Martin.

Bertha N. Martin—for Government—Direct

Miss Martin: Your Honor, I call your attention to Post Office Manual 114.532, which states that a postmaster may not give information unless directed to.

The Court: We have to first find out if you are a postmaster.

[18] BERTHA N. MARTIN, having been duly sworn, was examined and testified as follows:

Direct examination:

The Witness: Your Honor, I call your attention—

The Court: Just a minute. Sit down a minute. Ask the first question, please, her name and whether she is a postmaster or mistress.

By Mr. Creamer:

Q. Your name again, please? A. Bertha N. Martin.

Q. By whom are you employed? A. United States Post Office.

Q. And in what capacity are you employed by the United States Post Office? A. I am a postmaster.

Q. Where are you a postmaster? A. At Intercourse, Pennsylvania.

Q. Did you receive a communication from Eros Magazine?

The Court: Just a moment.

Now you may make your declaration. Make it, please, for the record.

The Witness: I call your attention to Postal Manual 114.532, which states a postmaster may not

Bertha N. Martin—for Government—Direct

give information [19] unless so directed by the court.

The Court: I direct you now to give that information.

The Witness: Thank you.

The Court: Proceed, please.

By Mr. Creamer:

Q. Mrs. Martin, I show you a letter dated September 4, 1962, on Eros stationery directed to the postmaster at Intercourse, Pennsylvania, and ask you, did you receive that in the ordinary course of your business? A. I did.

Mr. Creamer: If Your Honor please, I request that that be marked Government's Exhibit No. 2 for purposes of identification.

(Letter from Eros Magazine, Incorporated, to Postmaster, Intercourse, Pennsylvania, dated September 4, 1962, was marked Exhibit G-2 for identification.)

Mr. Creamer: If Your Honor please, I offer in evidence Government's Exhibit No. 2.

Mr. Dickstein: No objection.

Mr. Shapiro: Excuse me, Your Honor, just a moment. There is an objection to the admission of this letter on the grounds as the prior one. I just want to state that.

[20] The Court: Co-counsel had better agree on that.

Mr. Dickstein: We agree, Your Honor.

The Court: Offered by the Government and admitted.

(Exhibit G-2 received in evidence.)

Bertha N. Martin—for Government—Direct

By Mr. Creamer:

Q. Mrs. Martin, I show you Government's Exhibit No. 2 and I request you to read the first paragraph of that letter from Eros Magazine, Incorporated. A. "After a great deal of deliberation we have decided that it might be advantageous for our direct mail to bear the postmark of your city."

Q. Did you respond to that letter? A. Yes, I did.

Q. I show you a letter dated September 8, 1962, a carbon of a letter to Eros Magazine, Incorporated. Is this the letter that you sent in response to that initial letter? A. Yes, it is.

Mr. Creamer: If Your Honor please, I would like to have this marked for purposes of identification as Government's Exhibit No. 3.

(Carbon copy of letter dated September 8, 1962, from Bertha N. Martin, Postmaster, Intercourse Pennsylvania, to Eros Magazine, Incorporated, was marked Exhibit G-3 for [21] identification.)

Mr. Creamer: If Your Honor please, I move that this be offered in evidence. It is the postmaster's answer to Eros Magazine, Incorporated, dated September 8, 1962.

Mr. Shapiro: Same objection.

The Court: Let me see the letter.

(Mr. Creamer handed the exhibit to the Court.)

The Court: Admitted.

(Exhibit G-3 received in evidence.)

By Mr. Creamer:

Q. Mrs. Martin, would you kindly read that letter to Eros. A. "I acknowledge receipt of your recent letter concerning the bulk mailings.

Robert W. Sanders—for Government—Direct

"I must inform you that our office is very small and our equipment and facilities are limited. So, in view of this, I feel we are not able to handle mail in such a volume.

"Bertha N. Martin
"Postmaster"

Mr. Creamer: Thank you, Mrs. Martin. No further questions.

Mr. Shapiro: No questions.

Mr. Creamer: That's all, Mrs. Martin. Thank you very much.

[22] Mr. Creamer: Mr. Sanders, please.

The Court: Mrs. Martin, did you take the exhibit along down?

The Witness: Yes.

The Court: Would you leave it up here with the clerk of the court?

Thank you.

Mr. Creamer: Thank you, Your Honor.

ROBERT W. SANDERS, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Creamer:

Q. Mr. Sanders, by whom are you employed? A. I am employed by the United States Post Office Department.

Q. In what capacity are you employed? A. Postmaster of Middlesex, New Jersey.

Q. Did you have a privilege you wished to exercise?

A. Do you want to ask me any more questions, sir?

Robert W. Sanders—for Government—Direct

Your Honor, I would like to call your attention to Postal Manual 114.532 in regard to that I am not allowed to divulge information of the Post Office Department unless so directed by the Court.

[23] The Court: You are directed to answer in this court.

The Witness: Thank you, sir.

By Mr. Creamer:

Q. You are a postmaster at Middlesex, New Jersey; is that correct? A. Yes, sir.

The Court: Just a moment. Is that one or two words, Middlesex?

The Witness: One word, sir.

The Court: Spell it.

The Witness: M-i-d-d-l-e-s-e-x.

By Mr. Creamer:

Q. As part of your duties as postmaster in Middlesex did you handle certain mailings with regard to Eros Magazine, Incorporated? A. Yes, sir.

Q. Could you give us a summary of the Eros Magazine mailings? A. On the 13th of August, Eros Books, Incorporated, 110 West 40th Street, New York—

The Court: What year?

The Witness: 1962, sir.

The Court: Thank you.

The Witness: —requested through a mail-order [24] house, a patron of Middlesex Post Office, an application to mail without affixed postage.

Robert W. Sanders—for Government—Direct

By Mr. Creamer:

Q. Did they receive a permit? A. The permit was issued on August 14, 1962, permit No. 8. They started to mail on October 7 and have continued to mail up to the present time.

Q. Do you know how many pieces of 3rd-class bulk mail were sent out through Middlesex by Eros Magazine, Incorporated? Do you have any idea of the number? A. Yes, I do, sir. The approximate total pieces of 3rd-class bulk mail was 5,053,884 pieces.

The Court: The number, 5,053,000—

The Witness: 5,053,884 pieces.

By Mr. Creamer:

Q. Of your own knowledge, do you know whether they were advertisements for Eros or whether or not they were the magazines themselves? A. They were the advertisements for Eros, sir.

Q. Do you know how much it cost to send those 5,000,000-some advertisements out? A. The cost of that mailing was \$132,704.93.

Q. Do you know the total pieces of all classes of mail that was sent by Eros Magazine, Incorporated, with regard to Eros? [25] A. The total pieces of all classes of mail was 6,067,573.

Q. And what was the cost for all classes of mail for Eros advertisements? A. The total postage for all classes of mail was \$163,438.48.

Q. Now, with regard to Documentary Books, when did you receive an application to mail without affixing postage stamps for Documentary Books? A. On November 20, 1962, Documentary Books, Incorporated, requested through

Robert W. Sanders—for Government—Cross

the mail-order house, a patron of Middlesex Post Office, an application to mail without affixed postage.

Q. Was a permit issued? A. The issue of the permit, No. 8, was November 20.

Q. How many books did you receive for shipment of "The Housewife's Handbook on Selective Promiscuity"? A. Total number of pieces were 5,543.

Q. Did you have any contact with Liaison News Letter, Incorporated? A. Liaison Letter, Incorporated, mailed through my post office 1st-class mailings, sir. I have a letter, sir, from the mail-order house in one case telling me of how many they were mailing that day, and I also have only on my file copies the amount of 1st-class letters which could consist of the three different outfits.

[26] Mr. Creamer: I have no further questions.

Mr. Shapiro: We have some cross-examination, sir.

The Court: Mr. Dickstein, it is not necessary for you to rise in this court unless you choose to do so.

Mr. Dickstein: I sometimes prefer to do so.

The Court: You may.

Mr. Dickstein: I can see over the heads and see the witness better in this case.

The Court: The choice is with you.

Mr. Dickstein: Thank you.

Cross-examination by Mr. Dickstein:

Q. Mr. Sanders, did you say you were the Postmaster of Middlesex, New Jersey? A. That's right, sir.

Q. This mail order house that you referred to, do you know the name of this mail order house? A. This mail order house comes under a number of names depending on whom they mail for. In the case of the mailing of Eros it was the General Mailing Corporation.

Robert W. Sanders—for Government—Cross

Q. And are you familiar with the General Mailing Corporation? A. Yes, sir.

[27] Q. Is it not a fact, Mr. Sanders, that the General Mailing Corporation is one of the largest mailing houses in the United States? A. You would have to repeat that question. I missed part of it, counsel.

Q. I said, is it not a fact that the General Mailing Corporation is one of the largest mailing houses in the United States. A. It would be a little hard for me to answer, sir. I don't know about other mail order houses. I know it is very large.

Q. Are you familiar with the amount of mail that this mailing house places through the Middlesex Post Office? A. I have it on record, yes, sir.

Q. Could you give me an approximate or an exact figure of the amount of the total mail handled in one year by General Mailing Corporation? A. It would be an absolute guess, sir.

Q. I don't want an absolute guess. You have no idea? A. Not unless I go into my records, sir. They mail continuously every day and mail for four or five—

Q. Is it substantial? A. Yes, sir.

Q. Is a mailing of five million pieces an extraordinary [28] mailing for the General Mailing Corporation? A. Are you speaking—

Q. Over a period of time. A. Over a period? Yes, sir, it is a little large.

Q. Is the General Mailing Corporation big enough to have its own sub-post office station in its own plant?

Mr. Creamer: I object, Your Honor. I think we are getting pretty far afield.

Mr. Dickstein: Your Honor, as I understand the purpose of Mr. Creamer's testimony, it was to show there is something a little offensive in using the

Robert W. Sanders—for Government—Cross

post office at Middlesex, New Jersey, and I am trying to demonstrate not only is it not offensive, but the General Mailing Corporation is one of the largest mail order houses in the eastern United States.

The Court: It goes beyond the scope of the direct but I will permit the question.

By Mr. Dickstein:

Q. Would you answer my last question?

(The question was read.)

A. I would have to answer that, sir, that we have a substation in that plant that handles all of the mail from that plant which consists of eight or nine different companies.

Q. They are all affiliates, are they not? [29] A. Yes, sir.

Q. Does that particular post office substation handle any general mail, that is, mail from the general public? A. No, sir, only from this one corporation.

Mr. Dickstein: No further questions.

Mr. Creamer: I have no questions, Your Honor. Thank you. That's all, Mr. Sanders.

Mr. Creamer: Mr. McDermott.

HUGH J. McDERMOTT, SWORN.

Mr. Creamer: If Your Honor please, in order to expedite things at this time I would like to have marked as exhibits and offer in evidence the various

Robert W. Sanders—for Government—Cross

advertisements that are in the indictment, and I think if we could have just a minute we might be able to stipulate and do it quite quickly.

The Court: All right. Relax a minute, Mr. McDermott. We will see what happens.

(Discussion off the record at counsel table.)

Mr. Creamer: If Your Honor please, I would like to have this marked as Exhibit B to the stipulation since the stipulation doesn't identify them with particularity [30] but it does identify them generally, and I would like to have them marked. There are 10 advertisements which are the ones that are in the indictment.

The Court: What do you want to have them marked?

Mr. Creamer: I would like to have them marked as Exhibit "B" to the stipulation.

The Court: We had better mark them in the order in which we have them. They are not in the stipulation and these are something separate and apart from the stipulation. As far as I am concerned I direct they be marked, each one separately.

Mr. Creamer: Very well.

Mr. Shapiro: If Your Honor please, before they are marked I was under the impression, though I may be mistaken, that they were annexed to the stipulation prior to its filing with the Court.

The Court: If they were annexed then that would be proper.

Mr. Shapiro: That's right.

The Court: We don't need to have them marked if they were annexed. It is my impression they were not annexed.

Mr. Shapiro: I did not know that.

Exhibits Marked for Identification

[31] Mr. Creamer: They were never annexed, Your Honor, unfortunately.

The Court: We are not pushed so much for time that we have to do that in two minutes. It is important to everybody and we are going to take our time. We will have to do this in what we think is the proper way.

Mr. Creamer: If Your Honor please, I request to mark as Government's Exhibit No. 4 an advertisement for Documentary Books, Incorporated, directed to Dona Tobin, 520 Willow Grove Avenue, Philadelphia, Pennsylvania.

The Court: What is the name of the person?

Mr. Creamer: Dona Tobin.

The Court: From whom, Documentary Books?

Mr. Creamer: It is from Documentary Books, Incorporated, an advertisement for that publication. I request it be marked as Government's Exhibit No. 4.

(Envelope and enclosure from Documentary Books, Inc., to Dona Tobin was marked Exhibit G-4 for identification.)

Mr. Creamer: And another advertisement from Documentary Books, Incorporated, to Wilbur J. B. Ingham, 1010 Winchester Street, Philadelphia 11, Pennsylvania. I request that that be marked as Government's Exhibit No. 5.

(Envelope and contents from Documentary Books, [32] Inc., to Wilbur J. D. Ingham was marked Exhibit G-5 for identification.)

Mr. Creamer: An advertisement from Documentary Books to Russell N. Leidy, 209 James Drive, Wynne Glade, Havertown, Pennsylvania. This, too,

Exhibits Marked for Identification

is an advertisement from Documentary Books, and I request that it be marked as Government's Exhibit G-6.

(Envelope and contents from Documentary Books, Inc., to Russell N. Leidy was marked Exhibit G-6 for identification.)

Mr. Creamer: An advertisement for Liaison News Letter directed to Lisette R. Peters, 111 Chapel Road, New Hope, Pennsylvania. I request that this advertisement of Liaison be marked Government's Exhibit 7.

(Envelope and contents from Liaison to Lisette R. Peters was marked Exhibit G-7 for identification.)

Mr. Creamer: An advertisement for Liaison News Letter directed to Miss Mamie Foery, 6 East Mercer Avenue, Havertown, Pennsylvania. I request that this advertisement of Liaison be marked G-8.

(Envelope and contents from Liaison to Miss Mamie Goery was marked Exhibit G-8 for identification.)

Mr. Creamer: Another Liaison advertisement directed to Eleanor Call Ahan, 9 South Valley Road, Paoli, [33] Pennsylvania. I request that this Liaison advertisement be marked Government's Exhibit 9.

(Envelope and contents from Liaison to Eleanor Call Ahan was marked Exhibit G-9 for identification.)

Mr. Creamer: An Eros advertisement directed to the Reverend John E. Greening, Burholme Baptist Church, 905 Cottman Avenue, Philadelphia 11,

Exhibits Marked for Identification

Pennsylvania. I request that this Eros advertisement be marked G-10.

(Envelope and contents from Eros to Reverend John E. Greening were marked Exhibit G-10 for identification.)

Mr. Creamer: A second Eros advertisement directed to Mother Mary Martha, Rosemont College, Rosemont, Pennsylvania. I request that that Eros advertisement be marked as Government's Exhibit 11.

(Envelope and contents from Eros to Mother Mary Martha were marked Exhibit G-11 for identification.)

Mr. Creamer: An Eros advertisement directed to Tom Kaufman, 118 Westminster Street, Chester, Pennsylvania. I request that that be marked Government's Exhibit 12.

(Envelope and contents from Eros to Tom Kaufman were marked Exhibit G-12 for identification.)

Mr. Creamer: And finally an Eros advertisement directed to Ogontz Junior High School, High School Road [34] and Montgomery Avenue, Elkins Parks, Pennsylvania, and I request that that Eros advertisement be marked Government's Exhibit 13.

(Envelope and contents from Eros to Ogontz Junior High School were marked Exhibit G-13 for identification.)

The Court: That's ten, Mr. Creamer?

Mr. Creamer: Pardon me, sir?

The Court: Ten?

Mr. Creamer: Yes, sir.

Exhibits Marked for Identification

At this time I request that Government's Exhibits G-4 to G-13 which are the advertisements for all three of these publications and which appear in the indictment be admitted in evidence.

The Court: That's the envelope as well as the contents thereof?

Mr. Creamer: That's correct, Your Honor.

Mr. Shapiro: May I inquire the purpose of offering them, Your Honor?

The Court: You may.

Mr. Shapiro: I so inquire.

Mr. Creamer: If Your Honor pleases, these advertisements appear in the counts of the indictment so I think they are very material to the trial of this case, [35] and also at a later time we will ask the Court to read these advertisements and we will make an argument on the basis of what is offered by these advertisements, so they are a material part of the record, and in part they will go toward intent.

The Court: Mr. Shapiro.

Mr. Shapiro: Well, on intent, Your Honor, unless there is any testimony connected, how the addresses were selected, we would like to inform the Court that we are going to make a very vigorous objection.

Mr. Creamer: If Your Honor pleases, the stipulation establishes that they agree that they knowingly mailed these advertisements. I don't understand this objection at this time. We did away with it. We stipulated on the basis that we wouldn't have to bring these people in. Now, if they want us to bring them in we will have to bring them in, but that's what they stipulated to, that they knowingly mailed these advertisements.

Colloquy of Court and Counsel

The Court: I believe that both of you are talking about different matters.

Mr. Shapiro: Exactly.

The Court: Mr. Shapiro, what were you going to say?

Mr. Shapiro: I think the whole point is this, [36] and this is the thing we are trying to make clear, there is no question about the fact that we mailed some six million advertisements.

The Court: Well, I believe that Mr. Creamer thought that your objection was to another matter. Maybe I am wrong. I don't know.

Mr. Shapiro: I think I know very well—

Mr. Creamer: Is he objecting to an alleged class of people?

The Court: I don't know.

Mr. Creamer: I don't understand his objection, I am afraid.

Mr. Shapiro: I will reserve my objection, Your Honor, and see the nature of the testimony with respect to the particular addressees. We have no question—

The Court: What we will do, then, Mr. Shapiro, is, they have been offered in evidence now. We will admit them and you, sir, may make a motion to strike whenever you choose.

Mr. Shapiro: Thank you, Your Honor.

I haven't seen the outside of the envelopes, Mr. Creamer.

(Mr. Creamer handed the exhibits to Mr. Shapiro.)

[37] The Court: I would like to have you repeat for me: You said you admit mailing over 600 pieces of mail similar to that?

Mr. Shapiro: Six million, Your Honor.

Colloquy of Court and Counsel

The Court: Similar to what you have in your hand?

Mr. Shapiro: Yes sir.

The Court: All right.

Mr. Shapiro: Our objection goes to the markings on some of these envelopes.

The Court: What do you mean, markings?

Mr. Shapiro: The added notations which were not a part of the exhibited material.

The Court: Added notations?

Mr. Shapiro: For example, G-13.

The Court: You mean an added notation in pencil or ink?

Mr. Shapiro: Yes, sir.

The Court: The Court will not consider any added notation and you may move to strike that immediately. I have not seen it, but it is not part of this case.

Mr. Creamer: I will also request that you not consider any added notations.

The Court: If you want to strike it out so I [38] cannot see it, since I am both Court and Jury, I would be happy to have you do it. I will not consider any writings on the outside.

Mr. Creamer: No, sir. We are not asking that you do.

The Court: Extraneous matter is absolutely no part of this case.

(Exhibits G-4 through G-13, formerly marked for identification, were received in evidence.)

Direct examination by Mr. Creamer:

Q. Mr. McDermott, by whom are you employed? A. The Post Office Department.

Hugh J. McDermott—for Government—Direct

Q. In what capacity are you employed? A. I am a postal inspector.

Q. How long have you been a postal inspector? A. 12 years.

Q. Did you investigate this case?

The Witness: Your Honor, again I would like to call your attention to 114.451 of the Postal Manual which directs me to refrain from answering any questions unless specifically directed to do so by you.

The Court: You are directed to answer the questions propounded by counsel unless I rule you should [39] not answer them.

By Mr. Creamer:

Q. When did you first begin to investigate this case? A. The exact date I cannot recall but it was within days after the first mailing of Eros at Middlesex, New Jersey.

Q. Why did you investigate the case? A. I was assigned the investigation by my superiors to determine if there was a violation of the postal obscenity statutes.

Q. As part of your investigation did you receive certain complaints with regard to any of these publications?

Mr. Shapiro: That's objected to, Your Honor, as clearly irrelevant.

The Court: Objection sustained.

Mr. Creamer: I have no further questions, Your Honor.

Mr. Dickstein: No questions, Your Honor.

Mr. Creamer: Mr. Darr, please.

Jack Darr—for Government—Direct

JACK DARR, SWORN.

Direct examination by Mr. Creamer:

Q. What is your full name please? [40] A. Full name, John Willis Darr.

Q. Where are you from, Mr. Darr? A. New York City.

Q. Have you ever heard of Liaison News Letter, Incorporated? A. Yes.

Q. When did you first hear of Liaison News Letters, Incorporated? A. In late September or early October of last year.

Q. And what is your occupation, Mr. Darr, generally? A. I am a writer.

Q. A writer? And how long have you been a writer? A. 12 years.

Q. Now, when you first heard of Liaison News Letter, Incorporated, you indicated it was in September of 1962?

The Court: Or October, he said.

By Mr. Creamer:

Q. Or October? Would you indicate what happened at that time? A. At that time an employment agency referred me to the Eros offices where I was offered a job with the Liaison News Letter.

Q. You did go to the offices of Eros and Liaison? A. Yes, sir.

Q. And were you interviewed? [41] A. Yes.

Q. Who interviewed you when you first went there? A. Originally I was interviewed by a man named Warren Boroson.

The Court: I didn't hear it.

The Witness: Warren Boroson, B-o-r-o-s-o-n.

Jack Darr—for Government—Direct

By Mr. Creamer:

Q. What happened at that interview? A. It was an initial interview. I gave him my resume. We talked and that was all. He said he would pass the word along.

Q. What happened after that? A. Subsequently I received a postcard, I believe, from Mr. Ginzburg inviting me to submit some samples of my material, of work that I had done in the past.

Q. Did you then submit samples of material that you had written in the past? A. Yes, sir.

Q. Then what happened? A. Then he interviewed me.

Q. Who is "he"? A. Mr. Ginzburg.

Q. And do you know about what time that was, what month? A. It all took place within a week of the time I first [42] heard of Liaison.

Q. I see. A. When the employment agency sent me there.

Q. And what took place at this first interview with Mr. Ginzburg? A. It was a friendly chat. Liaison had not yet been started. There was really nothing to go on.

Q. Did he indicate to you what position you were going to fill, what you were going to do? A. I am sorry, excuse me.

Q. Did he indicate to you what position you were going to have or what you were going to do with regard to Liaison? A. He was looking for an editor and writer for Liaison.

Q. Did he tell you anything about the purpose or scope of Liaison? A. He asked me if I knew about Eros. I said, Yes, I had seen some copies, and that Liaison was to cover the same scope, in a more newsworthy fashion.

Q. Did he tell you anything else about your duties at that time, at the first interview? A. No, not that I can think of.

Jack Darr—for Government—Direct

Q. Did he hire you at that time? A. No, I don't believe so. I think it was on the second interview that he hired me.

[43] Q. Did he ask you to submit any other writings at the time of the first interview? A. No, I had submitted several pieces. Yes, he did. He asked me to write a sample piece perhaps for Liaison.

Q. And this was before you were hired? A. That's right.

Q. And did you write a sample piece for Liaison? A. Yes, a rough sample piece.

Q. And what was the title of the rough sample piece that you wrote, if you recall?

Mr. Shapiro: I am going to object to that as irrelevant.

The Court: Overruled.

The Witness: That means I answer the question?

The Court: Yes, sir.

A. "How To Run A Successful Orgy."

The Court: "How To Run A Successful"—

The Witness: "Orgy."

By Mr. Creamer:

Q. Did it ever subsequently appear in Liaison News Letter? A. In a revised form.

The Court: You will have to keep your voice up a little bit.

[44] The Witness: I am sorry, sir.

The Court: Because your voice sort of doesn't carry over my way.

It appeared in a revised form?

Jack Darr—for Government—Direct

The Witness: In a revised form.

Mr. Creamer: I request that Volume 1, No. 2 of Liaison News Letter dated December 1, 1962 be marked as Government's Exhibit 14.

(Volume 1, No. 2, Liaison News Letter, December 1, 1962 was marked Exhibit G-14 for identification.)

Mr. Shapiro: I have seen it. Do you want to offer it? I have an objection.

Mr. Creamer: If Your Honor please, I would like to offer this Government's Exhibit G-14 in evidence at this time.

Mr. Shapiro: I have an objection unless every other issue of Liaison subsequent to this one also goes into evidence.

Mr. Creamer: Your Honor, I have no objection to that, but I think he can put it in in his case.

Mr. Shapiro: I didn't hear the last thing you said.

Mr. Creamer: I said I have no objection to all the editions of Liaison going into evidence but I think [45] if he wants them in he should put them in in his case.

Mr. Shapiro: I think it is part of your case.

The Court: We will have to rule on the matter before the Court now, and that is the one I have here in my hand which I assume is part of the indictment? It is Volume 1, No. 1.

Mr. Creamer: That's right, Your Honor, and this is Volume 1, No. 2, and in this edition appears the article, "How To Run A Successful Orgy." Although it is not in the same form that this man submitted it, he submitted it in order to be hired by Mr. Ginzburg and we contend that this goes toward intent once again.

The Court: Objection sustained.

Jack Darr—for Government—Direct

By Mr. Creamer:

Q. Did you submit a draft on "How To Run A Successful Orgy"? A. Did I submit a draft?

Q. Did you submit it to Mr. Ginzburg? A. Not directly, no. I submitted it to the offices.

Q. Were you called back? A. Yes. Actually, I was hired over the telephone. Mr. Ginzburg phoned me and said, "When can you start to work?"

Q. Did Mr. Ginzburg say anything about what he thought [46] about "How To Run A Successful Orgy"? A. No, he didn't.

Q. Then you started to work with Liaison? A. That's correct.

Q. And would you describe generally the manner in which you operated as editor of Liaison? A. I inherited quite a collection of magazines, Newspapers, clippings, various notes which I then compiled, searched through, finished and researched and tried to make a news letter out of it. That's all I can say.

Mr. Creamer: I request that this be marked for identification as Government's Exhibit G-15. It is a white envelope with a notation "Used Liaison Stuff," and a number of articles, clippings and paraphernalia inside.

(White envelope marked "Used Liaison Stuff" and contents were marked Exhibit G-15 for identification.)

Mr. Shapiro: Are you going to offer it?

Mr. Creamer: Yes.

Mr. Shapiro: Make your offer.

Mr. Creamer: Just a minute. I will have it identified first by Mr Darr.

Jack Darr—for Government—Direct

By Mr. Creamer:

Q. Mr. Darr, is this the paraphernalia that was given to [47] you as reservoir material? A. I don't know. I have never seen it before.

Q. Would you study the contents? A. I would say from a quick glance that I have seen parts of this before, yes. It was partially—

Q. Can you identify it as the information you just testified to that was given to you by Mr. Ginzburg as the reservoir material for future editions of *Liaison*? A. No, I can't identify it as the stuff that Mr. Ginzburg gave me because it has been a long time and some of it I haven't seen and we would have to go through it piece by piece.

Q. All right. Thank you. A. I can identify one thing there as a thing I wrote.

Mr. Creamer: If Your Honor pleases, I would like to have *Liaison*, Volume 1, No. 1, marked for purposes of identification as Government's Exhibit G-16.

(Volume 1, No. 1, *Liaison News Letter*, November 17, 1962, was marked Exhibit G-16 for identification.)

Mr. Creamer: If Your Honor pleases, I would like to offer in evidence Government's Exhibit G-16 which is Volume 1, No. 1 of *Liaison News Letter*.

The Court: That's the item with which we are concerned in the indictment?

[48] Mr. Shapiro: No objection, Your Honor.

The Court: Admitted.

(Exhibit G-16, formerly marked for identification, was received in evidence.)

Jack Darr—for Government—Direct

By Mr. Creamer:

Q. Mr. Darr, directing your attention to the first issue of Liaison News Letter as to the statement of policy which appears on the first page, did you write that statement of policy? A. Yes.

Q. Did you at any time have any discussion with Mr. Ginzburg concerning the statement of policy? A. Concerning this particular statement of policy?

Q. Yes. A. No.

Q. You never showed it to him? A. I put it as was done with all the copy in a basket on the desk in the front office and from there it was transported up to his office upstairs and I would get it back on my desk the next day as a rule. That was the process.

Q. But you never had any specific discussion with Mr. Ginzburg concerning that statement of policy as to his reaction to it? A. As I remember it he might have made a passing remark, [49] you know, "It is all right," or something like that or "It is good."

Q. Did he say it was good? A. As I say, in passing he might have, because he was a very busy man. He was running around and he passed by.

Mr. Dickstein: Objection. Your Honor, the witness appears to be testifying to what is in the realm of possibility and not within his own knowledge.

The Court: You may answer the question if you know. If you don't know, of course, you can't tell.

The Witness: I am trying to answer the questions to the best of my ability, Your Honor.

The Court: All right. We have no jury here. Go ahead.

If you have any further objection you may make it.

Jack Darr—for Government—Direct

By Mr. Creamer:

Q. Now, with regard to the article, "Slaying The Sex Dragon," did you write that article? A. No, I didn't.

The Court: Is that in the same number?

Mr. Creamer: Yes, sir, it is in Volume 1, No. 1.

The Court: What page?

[50] Mr. Creamer: Page 2, I believe, page 2.

The Court: Page what?

Mr. Creamer: Page 2.

The Court: At the top?

Mr. Creamer: Yes, sir.

The Court: Yes.

By Mr. Creamer:

Q. How about the article appearing on page—

The Court: What was the answer?

Mr. Creamer: He did not write that, sir.

By Mr. Creamer:

Q. How about the article appearing on page 4, "Semen In The Diet"? A. Yes, I wrote that except for the quotes which came from the Journal of the Medical Association.

Q. And did you at any time have a conversation with Mr. Ginzburg as to reaction to that article which you called "Semen In The Diet"? A. No, I don't remember so. I remember talking with other people in the office about it. I was new and I wanted to try to get the feel of the organization. I did not know whether it would be acceptable or not. I asked one of the people to read it. They said they liked it so I submitted it to Mr. Ginzburg's basket.

Jack Darr—for Government—Direct

[51] Q. Did it come back to you approved? A. It came back with very little, if any, changes on it. Actually, if you read it you will see that it is mostly quotes from the Journal of the American Medical Association.

Q. Directing your attention to page 5 to the article "Sing A Song Of Sex Life," was that written by you? A. Yes.

Q. Did you ever have any discussion with Mr. Ginzburg about his reaction to that particular article? A. Yes, I think he liked one line in there.

Q. Pardon me? A. Yes, I think there was one line that he liked.

Q. And which line was that? A. "The professors have crawled out of the dust and discovered lust." I think I either brought it to his attention or somehow I remember we discussed that line.

Q. How much did you receive in salary from Liaison? A. \$7500 a year.

Q. Did Mr. Ginzburg ever give you instructions with regard to the last page of Liaison, any general instructions on what was to be done concerning the last page? A. The last page unfolds like so, should not contain any four-letter words.

Q. Why, did he tell you why? [52] A. No.

Mr. Creamer: No further questions.

The Court: Just a moment, please. It will be impossible to identify on the record the answer, when it was folded like so, unless you indicate to the court stenographer how you had it. Will you really fold the letter and explain how you had it folded?

The Witness: It is folded as it goes through the mail with the address on one side and the printed matter on the other, so that this printed matter is exposed to any postman or secretary or whoever might want to read it.

Jack Darr—for Government—Cross

Is that sufficient. Your Honor?

The Court: I have in my hand an item which shows on the one side the place where one's address can be put.

The Witness: That is right, sir.

The Court: And on the other side an order blank, and then on the other side merely "Liaison."

The Witness: Sir, it is folded thusly. I think you have it in the inverse.

The Court: So that what would be exposed would be the part—

The Witness: It would be the last half of page 6.

[53] The Court: The last half of page 6 which would be the part beginning with "(3) She was only a wrestler's daughter"—

The Witness: Yes, sir.

The Court: And ending with "'Make your way—the hour is passing'."

The Witness: Yes, sir.

The Court: All right.

Mr. Creamer: The Government has no further questions, Your Honor.

Mr. Shapiro: We have got two, Your Honor. Just a moment.

Cross-examination by Mr. Dickstein:

Q. Mr. Darr, did Mr. Ginzburg tell you that the purpose of avoiding four-letter words on that panel was to prevent the Post Office from being aware of the material that is contained in this publication? A. Not at all.

Q. In fact, this material was not mailed in sealed envelopes, was it? A. I don't know how it was mailed.

Q. Mr. Darr, are you still employed by Liaison? A. No, sir.

Jack Darr—for Government—Cross

[54] The Court: I can't hear you, sir.

The Witness: No, sir.

The Court: I mean I can't hear you.

Mr. Dickstein: The question was, "Are you still employed by Liaison?"

The Witness: No, I am not.

By Mr. Dickstein:

Q. When was your employment terminated?

Mr. Creamer: If Your Honor please, I object. This is exceeding the scope of the direct examination.

The Court: Objection overruled. Exception noted.

A. My employment was terminated there, I guess it was, in November of that same year.

By Mr. Dickstein:

Q. Could you associate your termination with the publication of any particular issue of Liaison, that is, was it after Issue 2 or 3 or what have you? A. I had completed five issues of Liaison and two had been published.

Q. Did you see the issues of Liaison, Numbers 3, 4 and 5, as they were actually sent out? A. Yes, I have copies of them.

Q. Were they the same issues or did they contain the [55] identical material that you had prepared and submitted? A. Not all of it, no.

Mr. Dickstein: No further questions.

Mr. Creamer: No further questions, Your Honor.

The Court: We will have a ten-minute recess.

(A short recess was taken at 11:15 A.M.)

Exhibits Marked for Identification

Mr. Creamer: If Your Honor pleases, I request that "The Housewife's Handbook On Selective Promiscuity" by Rey Anthony be marked as Government's Exhibit G-17

The Court: That's the little black book?

Mr. Creamer: Yes, sir.

Mr. Shapiro: No objection to its being marked for identification and offered in evidence.

Mr. Creamer: In that event, I offer it in evidence.

The Court: Just a moment, please. I want to complete my record.

Thank you.

("The Housewife's Handbook on Selective Promiscuity," by Rey Anthony, was marked Exhibit G-17 for identification.)

[56] Mr. Creamer: I offer at this time G-17, which is the "Housewife's Handbook On Selective Promiscuity," by Rey Anthony, in evidence.

(Exhibit G-17, formerly marked for identification, was received in evidence.)

Mr. Creamer: I request that Eros magazine, Volume 1, No. 4 be marked as Government's Exhibit G-18 for purposes of identification.

The Court: Does this Eros have a volume and number?

Mr. Creamer: Yes, sir.

The Court: What page?

Mr. Creamer: It appears on the outside, Eros, Volume 1, No. 4.

The Court: Volume 1, No. 4?

Mr. Creamer: Yes, sir, and it also, I believe, appears, Eros, winter, 1962, Volume 1, No. 4 on the first page.

Motion to Dismiss Indictment—Refused

The Court: Really on the first printed page of the publication?

Mr. Creamer: Yes, sir.

(Eros, Volume 1, No. 4, was marked Exhibit G-18 for identification.)

Mr. Creamer: Your Honor, this is G-18, the [57] edition of Eros in the indictment, Volume 1, No. 4, and at this time I offer it in evidence.

Mr. Shapiro: No objection.

The Court: No objection? Admitted.

(Exhibit G-18, formerly marked for identification, was received in evidence.)

The Court: Now, somebody before the argument supplied me with these three matters that are now in evidence.

Mr. Creamer: Yes, sir.

The Court: In other words, we are not concerned with those? The originals have been marked over here? Then I will keep them and we will have the originals down in the clerk's office.

Mr. Shapiro: Yes, sir.

The Court: It will be easier for me. We have not enough space in our office for all the things we get in all our cases.

Mr. Creamer: If Your Honor please, the Government rests.

[58] Mr. Shapiro: The defense now moves for a dismissal of the indictment on the ground that the Government has failed to make out a case under 18 U. S. Code, Section 1461.

I am sure Your Honor does not want to hear extensive argument from me on the legal issue. Your

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Honor was very kind to hear extensive argument in connection with our motion to dismiss the indictment.

We feel that under the law, under the tests set forth in the Roth, Manual Enterprises cases, by the Supreme Court of the United States, the thing that I stated at the opening of my argument, this two-fold test of obscenity that is set forth in the ALI penal code has not been established on the face of the documents in this case, and since that is the only thing upon which the Government relies to establish it, we say that the Court should dismiss the indictment dealing with the mailing counts and, of course, in connection with my prior argument with regard to the non-applicability of the Hornick case in the Circuit any more, we say it also should dismiss the advertising counts.

That's my motion, sir.

The Court: Motion refused.

[59] DEFENDANTS' EVIDENCE

Mr. Dickstein: The defendants call Dr. Charles McCormick to the witness stand

CHARLES G. McCORMICK, SWORN.

Direct examination by Mr. Dickstein:

Q. Dr. McCormick, would you describe for the Court your educational background? A. My undergraduate work was completed in 1937 at Amherst College in Amherst,

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Massachusetts, graduate work for degrees; a Bachelor of Divinity at the Union Theological Seminary in New York City in August of 1944; a Doctor of Education at Columbia University in January of 1946.

I have done graduate study in psychology at the University of Denver, in Denver, Colorado; Springfield College, Springfield, Massachusetts; the University of Massachusetts in Amherst, Massachusetts; and at the New York School of Social Work, part of Columbia University in New York City.

Q. Have you done clinical work in psychological counseling?

The Court: I didn't hear the second word.

By Mr. Dickstein:

[60] Q. Have you done clinical work in psychological counseling? A. I am a clinical psychologist and have been in private practice as such for the past 13 years and on a part-time basis while working for other institutions like Vassar College for five years prior to that.

My training in clinical psychology began in September of 1942 at Columbia University concurrently with the work that I was doing at Union Theological Seminary.

Q. Are you a member of any professional organizations? A. I am a member of the American Psychological Association, the New York State Psychological Association, I am a Fellow of the American Group Psychotherapy Association and a member of the American Association for the Advancement of Science.

Q. Do you have a position with the International Journal of Group Psychotherapy? A. I am on the editorial board of the International Journal of Group Psychotherapy and have been since its founding which was approximately ten years ago.

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Q. Are you certificated as a psychologist in any jurisdictions? A. I am certified in New York State and in California as a psychologist.

Q. Do you teach psychology at any institution? A. I have been teaching psychology at the New York School [61] of Social Work in New York City since September of 1947.

Q. And continuously to this day? A. Continuously and continuing on into the next semester, also.

Q. Dr. McCormick, from your professional viewpoint can pornographic material be described in psychological terms? A. I can describe it as such.

Q. Will you please do so? A. Essentially for material to be pornographic it has to have several characteristics: (1) It must defile or defame sex and sexual expression. It must distort reality, psychological reality and physical reality. It must play up the ignorance and the fantasy of the reader. Its objective should also include creating the impression that the reader or the hearer or the viewer, whichever the case might be, is able to extract some kind of pleasure without any element of responsibility, and it must also have the basic sense of mixing the reader's own sense of guilt or dirt or taboo and pleasure. In other words, it must combine both the sense of pleasure and the sense of guilt or shame in the—

Q. Why is the sense of guilt in the reader a necessary element of pornography? A. The sense of guilt is essential because the reader has [62] to be incited against authority for one thing. In other words, he must have a continuing sense that what he is doing is bad so that he will not pay attention too closely to reality. He has to be engrossed by the sense that he is doing something against authority.

This, by the way, is one of the characteristics of pornographic material, that the characters in it who perpetrate different kinds of offenses against the sense of propriety

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are usually or often figures of authority like Senators, Ministers, Attorneys, and so on, in other words, authority figures in the community so that the individual has the sense actually of going against that which is taboo.

There is a certain satisfaction in outwitting authority, and this is part of the sense of guilt.

There is also a sense of being able to engage in something that is intrinsically bad to the reader based upon whatever he has accumulated from the air in which he grew up, as though it were something evil, something wrong, something that the authority would disapprove of, and at the same time there has to be the ability to experience the natural, normal, healthy pleasure that a physical organism provides every animal, so that's why the guilt feeling has to be there, and that's what is meant by guilt.

[63] Q. Well, what are the elements in our society that produce these guilt feelings?

Mr. Creamer: I object, Your Honor, unless he is going to be able to found some impact on society that he can testify from. He is speaking purely in psychology, in that field. Now, he is beginning to get into the impact on society, and I don't think he has been qualified to testify as to the impact on society.

I don't mind his discussion of the psychologic effects as he sees it concerning pornography and what the psychologist feels pornography is, but if he is going to try to interpret the impact or what society as a whole feels about pornography, I don't think he has been qualified.

Mr. Dickstein: That wasn't my question, Your Honor, and the purpose of my question is to illuminate the psychological description of pornographic material which Dr. McCormick has been giving.

The Court: I will overrule the objection.

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The Witness: May I have the question again?
(The question was read.)

A. I alluded to them when I said that the individual assimilates this from the atmosphere in which he is growing up, the prevailing anxiousness and the sense of taboo on the part of parents, teachers, the parents of playmates, and the [64] general attitude of the community at large. All of these things contribute to the development of this. In other words, this is what is making the impact on the child as he is growing up, that inculcates in his system the conviction that there is something bad or wrong intrinsically about some part of his experience.

Is this what your question was getting at?

By Mr. Dickstein:

Q. Yes.

How does pornographic material as such actually play a part in the sense of shame that all people have about sex to a greater or lesser degree? A. May I while I think of it give an illustration of what I mean? So often I know we psychologists don't talk very straight, but the way these attitudes get inculcated in the system, a very simple one that has nothing to do with sex as such where a child in a classroom in the sixth grade was studying social science, they call it, and it had to do with farming, and the question of fertilizer came up, and one of the fertilizers used according to the textbook was manure, and one of the children in the class asked, "How do they get manure," and the teacher refused to answer.

Now, there was nothing explicit on the part of the teacher in terms of saying that this is connected [65] with something that is taboo or bad so you should not think about those things, but the implication in the atmosphere on the basis of that refusal was profound.

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I hope that helps you take—the other question.

I don't have the present question now.

Q. Yes. The next question was, how does pornographic material play a part in the sense of shame that all persons in our society have about sex to a greater or lesser extent?

A. The inference in most pornographic material is conveyed—the inference of it being shameful is conveyed—in several ways (1) by the usual way in which these things are published. They are published secretly. They are published without acknowledgment. Most pornographic material that I have seen won't even carry a title page on which the author's name is given or the publisher's name is given. There is no date. There is no commitment or responsibility behind it. This is one way in which the person who would read this, if it falls into his hands, is given the impression that sex is shameful and that what this book or picture or whatever it is is about is a shameful item.

Another is that usually the characters in these publications themselves have a sense of shame about what they are doing. They have this experience of the [66] mixture of shame and pleasure and enthusiasm about what they are doing with the self-condemnation for what they are doing.

And then the authors as a general rule at the end of his publications will offer a kind of sermon about the evils or exorbitant indulgence in sexual expression.

These are some of the ways that pornographic material itself conveys the sense to the reader that sexual expression is evil.

It is always with a clandestine or illicit atmosphere surrounding the writing and frequently—

Q. Does the pornographic material which you have seen treat sex realistically? A. It is always unrealistic. This is one of the essential building blocks of pornographic material. In other words, there has to be a distortion of

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reality. The author's either knowledge or his intent in writing is extremely limited. In other words, he actually might not know or he might by design imply that the human anatomy, for instance, is capable of things that no animal organism is capable of. The size, the structure, the ability to perform and function in many different ways are exorbitant and unrealistic.

The emotional contexts within which these situations are developed are always unrealistic. They [67] frequently involve, for instance, the violation of preadolescents. There is one—may I refer to a publication?

The Court: You answer the questions of your counsel, whatever they are. If counsel for the Government has an objection, he may make it. I don't know what the next questions are going to be.

By Mr. Dickstein:

Q. Go right ahead, Dr. McCormick. A. It is this question of reality and whether these things are realistic. They are not.

In one book, for instance,—it is called "The Autobiography of the Flea"—there is the violation of a girl who is still pre-adolescent. She has not yet started to menstruate and the reaction of that child as portrayed by the author is completely unrealistic. The impact of the situation that she found herself in would have been so different from what the author himself portrayed that it was totally out of reality.

Q. But why is it necessary for this material to be detached from reality in order to create this function of sexual arousal and sexual shame, this combined effect of sexual arousal and sexual shame as you testified to? A. The principal reason for that is in order to avoid [68] distracting the reader by involving his judgment and his

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ability to discriminate. For him to make connections with it is impossible. This couldn't happen. As long as the author is able to keep his characters two-dimensional and to keep the plot completely superficial he is able to keep his reader's or viewer's attention exclusively on attempting to absorb the guilty pleasure from the material itself.

Q. Well, why does true or realistic material dealing with the subject matter of sex not accomplish this effect upon the average person? A. Why does true presentation or realistic presentation not accomplish it?

Q. Yes. A. Because reality brings with it an awareness of responsibility, an awareness of implication, an awareness of some kind of carrying charge, so to speak, for the individual. It doesn't detract from the pleasure or the satisfaction or the erotic experience, the fact that it is realistic, but it does eliminate the indulgence in irresponsible fantasy, sort of day-dreaming, and the reason for keeping it unrealistic is to eliminate this sense of burden or reality. If a person once gets to thinking while he is reading pornographic material he is going to get bored because it is just going to be the same diet over and over again of the impossible, [69] the irrelevant, and the unpleasant.

Q. You mean thinking as distinguished from indulging in fantasy? A. Exactly.

Q. Does pornographic material act as a sexual stimulant or does it produce sexual stimuli? A. Yes, it does.

Q. On most people? A. There would have to be something wrong with the person for it not to. In other words, by "wrong," I mean he would have to be ill in some way, physically or psychologically, if he experienced no erotic response to pornographic material.

Q. Would the view of an attractive nude woman stimulate sexual interest in a healthy, normal male? A. It would depend on the setting. For instance, if it were at certain camps that are set aside for so-called nudists, the fact

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that there are nude males or nude females would not be erotically stimulating to either sex or any individual. If it were at home, for instance, with the husband and wife, if they were accustomed to being around the house nude, their nudity as such would not be erotically stimulating, so there could be some situations in which nudity could be and others in which it would not.

Q. Doctor, assume with me for the purpose of the question [70] the circumstances are such as to create this sexual stimulant upon your average male. Could you distinguish between the feelings, the emotions, the psychological aspects of the effects of these two stimuli, that is, pornographic material with the view of the nude woman upon such person? A. The erotic element would be felt, experienced or conscious for the individual exactly the same. In other words, in a healthy situation where there was something erotically stimulating the person would feel it as an erotic response.

Q. Would the average person in the latter case, that is, the stimuli produced by the view of a nude woman, be ashamed?

Mr. Creamer: If Your Honor please, I object once again to having Dr. McCormick testify about the average individual. There has been no qualifications in his area of testifying as to the average citizen and I object on that ground.

The Court: Objection sustained. He may testify as to what he thinks and not what the average person thinks. I don't believe that that's part of his qualifications.

Mr. Dickstein: Your Honor, as a psychologist he has been both trained and experienced in the emotional aspects of people individually, of mental health, of mental [71] illness, and for purposes of the definition of what is pornographic material, of

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course, what is obscene material, one must weigh this material in terms of its effects on the average individual.

The Court: I will reverse myself and it will be granted, sir.

The Witness: May I have the question again? (The question was read.)

A. Not under the circumstances you have described.

By Mr. Dickstein:

Q. Would he have an itching or a morbid or a licentious form of sexual arousal? A. This can be produced only by some form of pathology in the individual himself. In other words, if he is ill—I don't want to take up your time with jokes—but one person actually considered the Rorschach—this is a joke; it is not a fact—the Rorschach ink blots as dirty pictures because he was able to see on the basis of his projections the figures that to him were erotically stimulating. Psychopathological individuals could, or if the publication were designed to do this, but under ordinary circumstances where the publication were a responsible one, there would be no reason to expect this to be so. Otherwise we would have to close down all our museums.

[72] Q. What do you mean by "a responsible publication"? A. Well, a museum would be a responsible one in the sense that it is established by the community and the people who are functioning on behalf of the community must account to the community for what it presents.

At the Metropolitan Museum in New York City, for instance, in the main corridor there is a special exhibition of Rodin's sculpture, and if you are familiar with that, you know that it is really erotic representations of males and females in nude direct contact. Under those circumstances, however, the general public as you would see them moving around among that exhibit are in no way inflicted with a

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sense of shame or a sense of debasement or any feeling of getting some free ride. They are engaged in a community enterprise of esthetic appreciation.

Q. Is the average person afflicted with a sense of shame with reading the type of pornographic material that you have described?

Mr. Creamer: If Your Honor please, I object again and I would like my objection to continue any time a question is drafted about an average person to this witness.

The Court: Objection overruled.

Mr. Creamer: On the same ground.

The Court: Exception noted.

[73] A. Under the circumstances of the material that the individual is dealing with, I don't believe there would be anybody except someone who was extremely exhibitionistic, which is pathological, who would feel comfortable about having his neighbor who wasn't also pathological see that he was reading that material.

Mr. Dickstein: Your Honor, we have some material that we wish to mark and subsequently offer.

The Court: Start with D-1.

Mr. Dickstein: It has been obtained from private collections and we would appreciate it if they can be marked with a label attached rather than stamped or separately inscribed on the material. That is not true of all of this material. This first batch we have no objection to having marked.

For Defendant's Exhibit 1 for identification we would like to have marked a little pamphlet which has no external identification other than the stamped picture of a pig.

(Small pig booklet was marked Exhibit D-1 for identification.)

Exhibits Marked for Identification

Mr. Dickstein: The next Defendant's Exhibit, D-2, for identification, a little pamphlet identified as "John Dillinger in 'A Hasty Exit.' "

[74] (Booklet entitled "John Dillinger in 'A Hasty Exit' " was marked Exhibit D-2 for identification.)

Mr. Dickstein: As Defendant's Exhibit 3 for identification a pamphlet, "Mr. Bregar Is Sold On TV."

(Booklet, "Mr. Bregar Is Sold On TV," was marked Exhibit D-3 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-4 for identification a pamphlet entitled "Dagwood Has a Family Party! Let's go."

(Booklet, "Dagwood Has a Family Party! Let's go," was marked Exhibit D-4 for identification.)

The Court: Is that "Dagwood"?

Mr. Dickstein: "Dagwood."

From this point on we ask that they be identified with labels rather than writing or stamping.

As Defendant's Exhibit D-5 for identification a pamphlet entitled "Secrets Will Out."

(Pamphlet, "Secrets Will Out," was marked Exhibit D-5 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-6 for identification a book entitled "The Oxford Professor."

(Book, "The Oxford Professor," was marked Exhibit D-6 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-7 [75] for identification a book called "The Autobiography of a Flea." I note, Your Honor, there is no title on

Exhibits Marked for Identification

the outside of the jacket. It is in a green binding without any other identification. It is, however, identified within the book by that title.

The Court: And the title?

Mr. Dickstein: "The Autobiography of a Flea."

The Court: That is D-7?

Mr. Dickstein: D-7.

(Book, "The Autobiography of a Flea," was marked Exhibit D-7 for identification.)

Mr. Dickstein: And as Defendant's Exhibit D-8 for identification a book entitled "Devil's Advocate."

(Book "Devil's Advocate," was marked Exhibit D-8 for identification.)

The Court: Pass them all over to Mr. Creamer, please.

As I have it, it is 1 to 8, inclusive, sir?

Mr. Dickstein: That is correct.

* * *

[77] *By Mr. Dickstein:*

Q. Dr. McCormick, have you read the material identified as Defendants' Exhibits D-1 through D-8? A. I have not read any of these, these little ones, the little paper ones.

The Court: The little paper ones, Doctor, are—

The Witness: Oh, yes. I am sorry.

The Court: You forgot to wear your glasses.

The Witness: Yes.

Mr. Dickstein: Would the record so note?

The Court: Yes.

Now, the answer is what, Doctor?

The Witness: The answer is, yes.

The Court: You have read—

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The Witness: I have seen these paper ones, the little paper ones that are the cartoon strips.

[78] The Court: That is D-1, D-2, D-3.

The Witness: D-2, 3, 4, and D-1.

The Court: D-5?

The Witness: And D-5. I have seen this, but I have not read it. I have not read it in its entirety.

The Court: D-5 you have not read?

The Witness: I have seen it. I have seen the pictures and some of the text, but just cursorily.

The Court: I think the question was general, was it not? Have you read all, or are you just showing the little booklets?

Mr. Dickstein: All.

The Witness: D-6, D-7, D-8 I have read completely.

The Court: Thank you.

By Mr. Dickstein:

Q. Doctor, will you give us your opinion of the effect of this material on the average reader.

Mr. Creamer: I object, your Honor. If the doctor is going to testify concerning any of these materials I think they should be offered in evidence, and if they are offered in evidence, I have no objection.

Mr. Dickstein: Your Honor, I can make the offer at this time, and I do so.

[79] Mr. Creamer: If your Honor pleases, I object to the introduction into evidence of these matters on the basis that they are not relevant to the inquiry that is before your Honor, and my authority is the Womack decision which is 294 Fed. 2d, 204, a 1961 case from the District of Columbia. Certiorari was denied 365 U. S. 859. In that case an attempt was made to place and offer into evidence certain other

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magazines. The instant case was a magazine case. The court held that it was immaterial and not relevant to the inquiry.

The Court: Do you have the case?

Mr. Creamer: I have the case here.

The Court: Do you have anything more you want to say?

Mr. Creamer: No, sir. That is the basis of the Government's objection.

The Court: Now, you, sir.

Mr. Dickstein: Your Honor, the purpose of the offer in the Womack case was to demonstrate the contemporary community standard by what is permissibly read in our country. It is not the purpose of this offer to accomplish that by any means. This is the material which we will show and which demonstrates for itself is pornographic. It is introduced for illustrative purposes and for the purposes of having Dr. McCormick testify with respect to its effect physiologically [80] and psychologically upon the average person. The Supreme Court test, as contrasted with the physiological and psychological effect of other types of material, including the material which is under indictment here.

The Court: I would like to see, before I make the final ruling, I would like to see. Whoever has the decision down here bring it up to me.

Mr. Shapiro: Right here, your Honor.

(A book was handed to the Court.)

Mr. Shapiro: It is on 205 and 206.

The Court: Will you state your objection again, Mr. Creamer.

Mr. Creamer: Yes, sir. My objection is based on the ground that these particular publications, or whatever you want to call them, are not relevant to

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the inquiry that we have now. Our inquiry is whether or not the materials under the indictment are obscene. If we go into an independent inquiry as to whether or not these are obscene, I think we are being carried far afield for the purpose of this inquiry, and whether or not—if these things are obscene is immaterial to the trying of this case. That is the Government's position, and we base it on the language in *Womack*.

The Court: And you, sir? Your answer to that was?

[81] Mr. Dickstein: Our answer to that was, your Honor, that they have probative value in underlining, in presenting the examples of the type of material which Dr. McCormick has testified to, which have the capacity of creating the physiological and psychological aspects in the average individual that the Supreme Court is talking about when it says the predominant appeal to prurient interest. It is further our intentions based upon this foundation to have Dr. McCormick testify as to the difference in the physiological and the psychological aspects of the material in question under this indictment and by illustrating, by talking to the differences as he is qualified to do by his expertise to show that this is not, that this material does not come within the ambit of Section 1461 of the statute.

The Court: I will restate my ruling as originally stated and permit you to testify to it, and also give you the opportunity if you desire later on to move to strike the doctors' testimony in regard to this. At the moment we are going to admit them in evidence.

Mr. Creamer: Thank you, your Honor.

The Court: Just a moment.

Now, sir.

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By Mr. Dickstein:

Q. Dr. McCormick, would you state the effect of this material [82] upon the average person.

The Court: I assume that comes under your original objection?

Mr. Creamer: Yes, sir. That comes under it. I object to any testimony regarding the average person.

The Court: Yes.

The Witness: The effect on the average person, or the person in the normal curve would be one of revulsion, and one of being assaulted. In other words, this would represent—I call it—it is not—I don't use this term legally, but it is statutory rape, in effect, because the person is reading it with acquiescence and at the same time his system is being taken advantage of by a predetermined course established by the authors. In other words, it is actually destructive for the individual, the ordinary individual to read that kind of material because he doesn't have the emotional base and he doesn't have the capacity for keeping context. This is the design of this kind of material, to keep the reader or the viewer from keeping reality context.

By Mr. Dickstein:

Q. At the same time the average reader is revolted would he also be sexually stimulated by this material? A. Yes, he would be sexually stimulated by this. He would be sexually—

[83] The Court: Did you look enough at D-5 to say that that applies to D-5 as well? Look at it and see what you have to say about it.

The Witness: Yes. This one, the amount that I have seen and the pictures that are contained therein, they are a violent assault on the system. You

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only have to read two pages of that. As a matter of fact, once you have read one of these you don't need to read—you don't have to read through one because they are repetitions. It is the same assault over and over again, and in this one little pamphlet the same material is covered in the first four pages that is covered in all of these volumes put together.

By Mr. Dickstein:

Q. Doctor, are you acquainted with the Grove Press edition of the so-called unexpurgated edition of the work of D. H. Lawrence, "Lady Chatterley's Lover"? A. Yes, I have read it.

Q. Could you describe the effect of a reading of that work upon the average person at this particular point of time in our society?

Mr. Creamer: I object once again, your Honor, on the ground that "Lady Chatterley's Lover" is not on trial, and the doctor can not testify to an impact on the average citizen.

[S4] The Court: I assume he would give the same reason?

Mr. Dickstein: That is correct, your Honor.

The Court: We will admit the testimony. Exception noted to the United States.

The Witness: There are several differences between the material—while it is erotic material—between the material in "Lady Chatterley's Lover" and this kind of material. They both are sexually stimulating, but the impact on the system of the ordinary individual is radically different. There is context. The reality setting, the reality factors, the complications, the responsibilities of the author, the attitude of the author as he presents this material, even though many people who would be in this category of ordinary citizen might be angered,

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or annoyed, or upset, or object to that kind of material, the actual effect on their system will not be unhealthy. It will not be destroying, tearing, as this material will. This is a responsibility in the sense that the actual presentation by the author gives you reality situations rather well—well, I am not a literary expert. So, I guess I won't testify as to how well written it is, but it is valid in character development. It is a good portrayal of that situation.

By Mr. Dickstein:

Q. Are you acquainted with "Lolita" by Nabokov?
[85] A. Yes, I am.

The Court: What is that? Spell that, please.

Mr. Dickstein: N-a-b-o-k-o-v.

By Mr. Dickstein:

Q. Have I spelled that correctly, Dr. McCormick? A. Yes.

Q. Does the book "Lolita" deal with the same type of subject matter that is contained or often contained in pornographic material as exemplified by Defendants' Exhibits D-1 through D-8? A. It is the exact—

Mr. Creamer: Pardon me. I object on the same ground. "Lolita" is not on trial in this case.

The Court: Same reason?

Mr. Dickstein: Same reason.

The Court: Objection overruled. Exception noted.

Mr. Shapiro: Excuse me, your Honor. I am going to make this suggestion: Might the United States Attorney have continuing objections to this rather than—

The Court: I do not know what we are going to run into. I have tried that in some other cases and it does not work. It would be much better to have

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you object when you have an objection because now we are dealing with various bits [86] of testimony and it is not a question of a series of docket entries in a book, and the next items are some more docket entries of various corporations. It does not work.

The Witness: The subject matter in the case of two of these documents is identical. In other words, this one not completely.

The Court: You are pointing to what?

The Witness: I am pointing to the "Oxford Professor" and the "Autobiography Of The Flea." These two, this "Oxford Professor" one contains one incident involving this kind of an episode of the seduction of an immature child, and the "Autobiography Of The Flea" is replete. It is completely that of the seduction of a pre-adolescent, and "Lolita" is the story of the seduction of a pre-adolescent by an established psychotic individual.

By Mr. Dickstein:

Q. They are similar, though, are they not, in the sense that they all deal with the same pathological state, and they all deal with the subject of sexuality? A. That is what I meant to convey. That is, they are actually the— the themes are identical.

Q. And could you tell us what the difference is in the way in which they deal with the similar subject matter? A. Well, that one word I presented this morning, "reality," [87] is the basic difference. In other words, the reality context where the character development by the author of "Lolita" and the character development—well, I guess I better stay with "Lolita." The character development in "Lolita" is actually valid. It is psychologically sound. It is a classic in that respect, and the reader is constantly supported by the author in appreciating the facts that this is one individual's distortion, but a reality of distortion. In the "Autobiography Of The Flea" the author

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doesn't support the reader at all in keeping the context of this actually being a pathological, sick situation, and the character development is not valid, either, because it is two-dimensional. In other words, it just suits the author's design to keep the reader engrossed in a sense of being soiled and pleased by sexual expression. In "Lolita" it is an actual development of a situation in real life. This is substance, and there is reality in "Lolita" and there is no reality whatsoever in the "Autobiography Of The Flea."

Q. Doctor, have you read the "Housewives' Handbook On Selective Promiscuity," Government's Exhibit G-17 in evidence? A. Yes, I have.

Q. Is the predominant effect of this book to create in the average person an itching, morbid or shameful desire or longing with respect to sex? [88] A. No.

Mr. Creamer: Objection, your Honor. The objection is based on the fact that that is the ultimate question of fact for the jury and should not be testified to by experts or alleged experts.

* * *

[90] Mr. Dickstein: * * * Although Mr. Creamer stated that the ultimate issue in the case is the prurient interest of the material that is not the ultimate issue at all. It is whether the material is obscene, just as in the Jenkins case the issue was mental disease and insanity—

The Court: Before you go on I wish you would give Mr. Creamer an opportunity to read that decision, unless you want to say something about a similar decision and he may want to look up both of them at the same time.

Mr. Dickstein: I was going to do that. I call [91] the Court's attention to Smith against the people, particularly the material bracketed at page 225 of 80 Supreme Court.

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The Court: I suggest that you look at that, Mr. Creamer, and then look at this.

(A book was handed to the Court.)

Mr. Creamer: Just one question. It was stated that I said the prurient interest was the ultimate fact. My recollection is that I did not. I said it was obscenity. I just wanted to correct the record in that statement.

* * *

[93] The Court: The case of *Smith versus People* is found in 361 U. S. 215 and the particular section called to the attention of the Court is page 225.

Mr. Creamer: With Your Honor's permission could I present my argument?

The Court: Yes.

Mr. Creamer: With regard to the *Jenkins* case which is a homicide case I refer to the Court's own language—just one moment, please—

The Court: That is not a homicide case; it is a burglary case.

Mr. Creamer: Oh, excuse me. Pardon me?

The Court: A burglary case.

Mr. Creamer: A burglary case, yes.

The Court: And some other things thrown in.

Mr. Creamer: In discussing expert testimony the Court says:

"First the subject of the inference must be so distinctly related to some science, professional business or occupation as to be beyond the ken of the average layman."

Now, in this case the question that is asked, the whole purpose of the law in obscenity is the average man applying contemporary community standards. It is the average [94] man we are looking for, not an expert. It is the same thing as if in a negligence

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case an attempt were to be made to have an expert testify as to whether or not there is negligence. There the average reasonable man test is applied by the jury and no expert is permitted to testify because it isn't something beyond the ken of the average layman, and this question of obscenity from the Supreme Court ruling is certainly not beyond the ken of the average layman. The whole purpose is to get, in effect, the average layman's feeling based on his contemporary community standard as to whether or not the material is obscene, so I think there is a distinction there.

Of course, when one testifies as a psychiatrist on insanity you are in a scientific field. You are in a field where the average layman has little or no knowledge, and it would be perfectly proper in those circumstances to have testimony concerning a man's medical condition.

I call Your Honor's attention to the Kahm case, Kahm versus United States, 300 Fed 2d, 78. That's a 1962 case where certiorari was denied by the Supreme Court, and in that case—

The Court: What was that page?

Mr. Creamer: Pardon me, sir.

The Court: What was the page?

Mr. Creamer: The page is 84. It starts at [95] 78. I am quoting from page 84:

"It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the Roth case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of

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a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present."

And in my argument here I rely on that language as well.

Then with regard to the Smith case, the concurring opinion by Frankfurter, the most that I can make of this concurring opinion in this area is that Justice Frankfurter feels that expert testimony should be heard with regard to contemporary community standards, and I respectfully submit to Your Honor that is not the question that has been presented to this witness. He has been asked his opinion as to whether or not this is obscene, "The Handbook," and for these reasons I [96] think the question is objectionable.

The Court: Let's have the question again and then let's have argument on the part of counsel for the defense.

Mr. Dickstein: I was going to suggest the question be restated because I did not expect the witness to remember.

(The question was read by the reporter as follows:)

"Q. Is the predominant effect of this book to create in the average person an itching, morbid or shameful desire or longing with respect to sex?"

Mr. Dickstein: Your Honor, the question of requisite prurient appeal of the work in question, one of the factors that the Supreme Court says goes into the test of whether material is or is not obscene is a question of a state of mind, what is going on inside

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of the skull of the average individual when he views the material under indictment.

Now, I daresay even if we could put on the witness stand 10 million people and have their psyches identified to establish them as average, as a matter of sound psychological principle they are the least competent observers as to what is going on inside of their heads. It is the psychologist or psychiatrist by reason of his special training who may testify on what is going on inside of the man's head in [97] terms of the effect of material upon him who can aid the Court in arriving at the ultimate conclusion which is obscenity and on which prurient interest appeal is just merely one aspect.

Your Honor has read the Smith case. I will not go into it, but I don't understand it as saying what Mr. Creamer suggests it is saying.

The Court: I will permit the question.

The Witness: May I hear the question once again?

(The question was read.)

A. No, it is not. That is the distinction between pornographic and erotic material. The distinction between pornographic and erotic education or material is that the pornographic material is morbid, does tend to corrode and to turn the person against himself in the process of reading or seeing.

In the case of "The Handbook," this effect will not take place for the ordinary person reading it.

By Mr. Dickstein:

Q. Doctor, based upon your professional knowledge and experience does "The Housewife's Handbook," Government's Exhibit 17, give a realistic picture of a woman's attitude and activities with respect to sex? A. It does.

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Mr. Creamer: I object, Your Honor, on the same [98] grounds.

The Court: Same ruling.

A. It does.

By Mr. Dickstein:

Q. Is it a guilt-laden work?

The Court: I didn't hear.

By Mr. Dickstein:

Q. Is it a guilt-laden work in psychological terms?

Mr. Creamer: I object, Your Honor.

The Court: Same ruling.

A. What you are getting at there is, does it actually produce or is it intended as with the authors of pornographic material?

By Mr. Dickstein:

Q. Speak to what its actual effect is again upon the average person. A. It will not produce a guilt feeling in the individual who is reading it because it is supported by a responsible attitude on the part of the author. In other words, the person finishing reading that will feel informed rather than guilty.

Q. Have you read "Eros," volume 1, No. 4, Government's Exhibit 18 in evidence? A. Yes, I have.

[99] Q. In your opinion, would the predominant effect of this book be to create in the average person an itching or morbid or shameful desire or longing with respect to sex?

Mr. Creamer: Objection, Your Honor, on the same ground as previously stated.

The Court: Same ruling.

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A. No, it would not. Again it is a serious work.

A one-sided observation is that the ordinary person would have difficulty getting through it because he has to work to do so; he has to be serious about reading.

Q. Leaving aside for the moment the question of the morbid form of sexual arousal that you spoke of in terms of pornographic material, is there any significant portion of "Eros," No. 4, which would be sexually stimulating to the average person, and here I mean when I say "sexually stimulating" a healthy sexual response.

Mr. Creamer: Objection, Your Honor, the same ground.

The Court: Same ruling.

A. You mean any portion of it?

By Mr. Dickstein:

Q. Any significant portion. A. I don't understand what would be a significant portion, [100] but there are a couple of passages in there that would be erotically stimulating to an individual reading it.

Q. To an average individual? A. To an average individual reading it.

Q. When you say "a couple of passages," could you give it in terms of lines? A. It is in the article by Frank Harris, I think his name is, or it is part of his writing, actually, and it is hard to do from memory, but I would guess that there are several pages that would actually be erotically stimulating.

The Court: Will you take the book and point those out?

Mr. Dickstein: Pardon me?

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The Court: Will you take the book and point those out?

(Mr. Dickstein handed the book to the witness.)

A. Beginning—this is on page 41—beginning with the last central paragraph on that page, there are—

The Court: "I got up," is that it?

The Witness: "I got up immediately," beginning with those words, "I got up immediately" on page 41 and continuing to the top of page 42 ending with the words "dear"—it is "dear, dear."

The Court: On which column?

[101] The Witness: The first column.

The Court: That would be the end of the first paragraph of the first column?

The Witness: Right.

There is another section in here that would have that kind of effect, too.

By Mr. Dickstein:

Q. Would that be the portion of the article by the Kronhausens? A. No, I mean in this same article by Frank Harris.

Q. Oh. Can you identify that other portion of the Frank Harris article? A. On page 43, the right-hand column under the heading "Searching For Perfection," and ending on page 44, the first column just above the heading, "The Great West Beckons." The sentence ends, "but don't let's talk of it." That's page 44.

Now, in the article by the Kronhausens, the article begins on page 65, there are some quotations. Within the body of the article there are quotations by the authors of other works.

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The Court: What page was that, sir?

The Witness: The article begins on page 65. The title of it is "The Natural Superiority of Women As [102] Eroticists."

The Court: And starting where, sir?

The Witness: At the top of the third column on that page 65 beginning with the words, "The strange quality," excepting the interjection by the authors, it continues. There is one paragraph at the middle of the column that is by the authors that would be omitted in terms of this effect, continuing over to page 66, ending that first paragraph in that first column.

The Court: "Through her body"?

The Witness: "Through her body."

By Mr. Dickstein:

Q. Doctor, these portions that you have just referred to as being erotically stimulating, would this stimulate in the average person a morbid or unhealthy attitude toward sex? A. No.

Mr. Creamer: Objection for the same ground.

A. No, that is the distinction. In other words, there is no corroding or morbid effect. There is no deteriorating effect on the individual because of the reality context that the author who is being quoted here maintains. It is realistic. It is erotically stimulating but it is not pathological. In other words, there is not a sickness that [103] is being insinuated into the reader, and this is the difference and why it would not create a morbid effect on the reader but it would be erotically stimulating.

By Mr. Dickstein:

Q. Have you read Volume 1, No. 1 of "Liaison," Government's Exhibit G-16 in evidence? A. Yes, I have.

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Q. Would the predominant effect of this issue of "Liaison", either create in the average person an itching, morbid or shameful desire or longing with respect to sex?

Mr. Creamer: Objection, Your Honor, on the grounds as stated.

A. Not at all.

The Court: Overruled.

A. Actually I wasn't able to find anything erotically stimulating in it for a normal individual, ordinary individual. A person to be so stimulated by any of this material would himself have to be abnormally ill.

By Mr. Dickstein:

Q. Could you give us a brief description in psychological terms of the type of individual who would be sexually stimulated at all by any material in "Liaison"? A. It would be an individual that we would call paraphiliac is the technical term. Is this what you want, a technical [104] psychological explanation?

Q. Yes, please. A. It would be somebody who due to his distortion, psychic distortions, is able to extract from a fight or from an assaultive attitude sexual response regardless of whether it has any genital reference. In other words, somebody who could enjoy seeing somebody punched in the face or dropped on the street by a blow is the only kind of individual that would get any sexual response from this, and this would be perversion. It would be a person who is already perverted. In effect, he could create it as he looks at some material by reversing anger into sexual feeling.

Now, the bases of that primarily are these two articles which are the body of your "Liaison," one by Dr. Albert

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Ellis and the other, this "Semen in the Diet." Both of them have that same tone of fight, of assault on the reader, without having any established association with him. Neither one of them has any erotic effect on the reader or would have any erotic effect on the reader because they are private fights of the authors that are coming through those articles.

Q. Doctor, do you consider "The Housewife's Handbook" from the point of view of the psychologist a useful work? A. It would be quite useful as an educational instrument.

[105] Q. What do you see as the teachings of "The Housewife's Handbook"? A. The principal ingredient of that book is that it gives in real life terms with the idiom of a particular individual a realistic portrayal of the evolution of sexual awareness and sexual expression, an individual who is an ordinary, everyday person, with the natural emotional and intellectual limitations who had to grope her way through just like everybody else has to grope his way through toward some kind of a sexual adjustment, and in that sense it is a valuable instrument for a person who is looking for that kind of education, in other words, for sexual education.

Q. Do you see any clinical use for this book? A. I don't know whether this is relevant to your question, but in reading it myself it was useful to be able to see the handicaps of an ordinary normal person in expressing himself or herself in this instance constructively where the errors were precipitated, were caused by the author's emotional limitations. In other words, some of the things that the author does are actually the result of the author's own lack of development which lack of development is practically universal, and on the strength of that I found it useful as additional case confirmation material.

Is this what you meant?

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[106] Q. No, it wasn't. Well, you have answered one question. I was not referring to the use to the clinician, but whether the book would have a value if read by an average person. I am not speaking of a pathological person now.

Mr. Creamer: That's objected to, Your Honor.
The Court: Same ruling.

A. It would, I think it would be useful under supervision. I make the same restriction with respect to "The Handbook" that I make with reference to a great many popular books on psychopathology where the layman in reading it would not be able to distinguish those aspects that were the individual's own problems and those aspects of the material that were a natural, universal problem of getting educated, and on that basis I would like to be able to guide the person in making those distinctions.

Mr. Dickstein: No further questions.

A. May I make one further observation on that because I think this is a thing that the author's presentation deserves and that is the difference between—

Mr. Creamer: If Your Honor please, I request the witness answer questions and not expound on his own initiative.

The Court: Objection sustained.

[107] Mr. Dickstein: Your Honor, may I consult with Mr. Creamer for one moment?

(Discussion off the record.)

Mr. Dickstein: Your Honor, Mr. Creamer has kindly consented to allowing me to interrupt his examination of Dr. McCormick. We have a witness who must leave the court. He will not be long, and Mr. Creamer, of course, reserves his right to cross-

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examine Dr. McCormick and will be accorded an opportunity to do so.

The Court: It may be done.

Step down, Doctor.

Mr. Creamer: You are finished with the witness, I take it, at this time?

The Court: Step down, Doctor.

I didn't hear you, Mr. Creamer.

Mr. Creamer: I just wanted to make sure he was finished with the witness at this point before I began my examination.

Mr. Dickstein: The defendants call Dr. Horst Janson to the stand.

[108] HORST W. JANSON, SWORN.

Direct Examination by Mr. Dickstein:

Q. Professor Janson, where did you receive your education? A. I studied the history and criticism of art at the Universities of Hamburg, Munich and at Harvard University where I received my M. A. in 1938 and my Ph.D in 1942.

Q. Have you taught art and the history of art in any institutions of higher education? A. I have done so since 1936.

Q. Would you tell us where and the periods in which you did so? A. I taught at Harvard in 1936-37; in the Art School attached to the Art Museum at Worcester, Massachusetts, from 1936 to 1938; at the State University of Iowa from 1938 to 1941; at Washington University, St. Louis, from 1941 to 1948; and since 1949 I have been Profes-

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sor of Fine Arts and Chairman of the Department at New York University.

Q. Have you ever received Guggenheim Fellowships?

A. I have received two.

Q. When was this? A. In 1952 and in 1957.

Q. What are your publications, Doctor? [109] A. I have published a considerable number of articles and scholarly journals and a number of books including "Apes and Ape Lore in the Middle Ages and the Renaissance," published in 1962 at Warburg Institute of London University; a two-volume work entitled "The Sculpture of Donatello," published by the Princeton University Press in 1959; "The Story of Painting for Young People," together with my wife, Dora Jane Janson, published in 1952; "A Picture History of Painting," in 1957; "Key Monuments of the History of Art" in 1959; and a college textbook entitled "History of Art" that came out last fall.

Q. Doctor, what is the name of the official journal of the College Arts Association of America? A. "The Art Bulletin."

Q. Do you have any function with respect to "The Art Bulletin"? A. I am its editor-in-chief.

[110] Q. Have you previously seen Volume 1 issue for Eros, Government's Exhibit G-18 in evidence? A. I have.

Q. Do you have a copy of that with you? A. I don't.

Q. May I provide one? A. Thank you.

Q. Doctor, would you turn to page 2 of this exhibit.

A. I have done so.

Q. Who is the artist who did that particular plate? A. This is Albrecht Durer, the greatest German artist of the 16th Century.

Q. Would you continue, then, and turn two pages to the pages following page 7—excuse me, following page 5. A. Indeed. On page 6 there are four engravings by Aldegrever

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who is another fine German 16th Century artist, and on page 7 it would be an etching by Rembrandt of 1634.

Q. Would you turn the page again to pages 8 and 9. A. On page 8 there is at the top an engraving by Hendrik Goltzius, an important Dutch engraver and painter of the late 16th Century. Below it are three engravings by Heemskerck, another Dutch artist of the 16th Century, and the top row on page 9 again consist of three engravings by Aldegrever dated 1555.

Q. And now pages 10 and 11. [111] A. On page 10 is a woodcut of the early 16th Century from a design by an unknown artist.

On page 11 are two engravings, one by Aldegrever, that is the one on the right, dated 1532, and on the left one by Allaert Claesz, a Dutch artist of the early 16th Century.

Q. And now page 12 and 13. A. The large reproduction on page 12 lapping over onto page 13 is by Lucas Van Leyden, 1519. The most important Dutch artist of the early 16th Century.

The smaller reproduction at the top of page 13 is also by Lucas Van Leyden, and the print in the lower portion on page 13 is once more by Hendrik Goltzius of the late 16th Century. It has a date which I can not quite read without a magnifying glass.

Q. Professor Janson, I ask you now to turn to page—the page immediately preceding page 82 which is not otherwise identified by a page number, but which is page 81. A. I see it.

Q. Would you please examine the illustrative material that is contained in the article in this version of *Lysistrata*. A. Yes, I have done so previously.

Q. Would you identify this particular work as belong to any school of art? A. It is derived from that of a well-known English draftsman [112] of the years around 1900 by the name of Aubrey Beardsley. These drawings actually are by a man named Lindsay, who is not previously known

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to me, but are sort of an adaptation of this style which is often called the "art nouveau" after a French term that has become accepted to characterize this particular style with its rather sort of mannered distortions on emphasis and outline. There are other elements in these drawings, some of them depending on Rubens, such as for instance the Bacchanalian theme on page 95.

Q. Will you now turn to the series of photographs beginning on page 73. A. Yes, indeed.

Q. What is your artistic judgment on the quality of the work on page 73 and the photographs that follow in this essay entitled "Black and White in Color"? A. I think they are outstanding beautifully and artistic photographs. I can not imagine the theme being treated in a more lyrical and delicate manner than it has been done here.

Q. What then are you referring to here? A. I am referring to the theme of interracial love which is, after all, the stated subject of these photographs.

Q. Is sex and love a familiar subject of artistic treatment? A. It certainly is.

Q. Has this been so for very long? [113] A. It has been so since time immemorial, practically, or at least since about 20,000 B. C.

Q. Are there any appropriate classical analogies that you can make to any of the photographic material contained in the article, "Black and White in Color"? A. Yes, indeed. The thing that struck me immediately when I looked through the series of photographs is this extraordinary sense of form and composition of this photographer. I might add here that of course photography in appropriate hands is an artistic instrument and this particular photographer has shown a very great awareness of compositional devices and patterns that have a long and well-established history in western art.

Q. For example. A. In the first photograph, for instance, you see the super-imposition of two profiles which

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is a very old device going back to the Renaissance methods and familiar to all of us from certain British postage stamps, and which has become a symbolic expression of blending together the equivalents of the two people so represented.

Q. Anything else? A. Well, the same impression is conveyed in the photograph on—let me see. These things are not paginated. Well, the full-page photograph of the two eyes, and you will find the [114] same pattern is again very powerfully conveyed in the final full-page photograph.

Q. Has the photographer extracted any artistic qualities out of the use of the Negro and Caucasian subjects?

A. He has, indeed. The very contrast in the color of the two bodies of course has presented him with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts.

Q. Have you formed any opinion as to the artistic merits of Eros as a whole? A. I have, indeed.

Q. What is that opinion, Professor? A. I feel that in terms of the material contained therein, in terms of the graphic layout, and the taste displayed in the presentation of this material it is certainly the equal of any magazine being published today.

Mr. Dickstein: No further questions.

Mr. Creamer: I have no questions, Your Honor.

Mr. Dickstein: Thank you very much, Professor.

Mr. Dickstein: Dr. McCormick, would you resume the stand.

Mr. Creamer: I have no questions of Dr. [115] McCormick, either.

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Mr. Dickstein: That's all, Doctor.

* * *

[116] Defendants call Maxine Serett.

LILLIAN MAXINE SERETT, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Dickstein:

Q. Mrs. Serett, are you the authoress of "The Housewives' Handbook on Selective Promiscuity"? A. I am.

Q. Would you speak up, please. A. Yes, I am.

Q. You wrote that under the pseudonym Rey Anthony; did you not? A. Yes.

Q. When did you start writing this book? A. I started collecting material about thirteen years ago, and about three years ago I sat down and worked it all up and finished it.

Q. What did you do with the manuscript of the book after you completed it? A. I set it up in type and printed and published it.

Q. Are you in the printing business? A. Yes.

[117] Q. How long before you completed the book did you go into the printing business? A. Around two years.

Q. What is the name of your printing establishment, or publishing establishment? A. Emerson Press is the parent name.

The Court: I did not get the name.

The Witness: Emerson, E-m-e-r-s-o-n, Emerson Press. For the purpose of pamphlets and publications as separate from our printing business we use Seymour Press.

By Mr. Dickstein:

Q. Do you publish "The Housewives' Handbook on Selective Promiscuity" under the label Seymour Press?

A. Yes, but it had a different title.

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The Court: What do you mean, "it had a different title"?

The Witness: The original title was "The Housewives' Handbook for Promiscuity." After one thousand copies we changed the title to the present title.

Mr. Creamer: Is that "Housewives' Handbook for Promiscuity"?

The Witness: Yes.

Mr. Creamer: Thank you.

[118] *By Mr. Dickstein:*

Q. Why did you change the title of your work? A. In order to make it more accurate and more explanatory because we did feel it is a highly discriminating writing and this actually conveyed the message better.

Q. What message were you trying to convey in the original title, or in the title finally adopted? What did you mean to describe by the use of this title? A. I meant to describe that what might appear to be promiscuous to one person with their moral code might not appear to be promiscuous to another person, not judging with the same moral code.

Q. How did you come about to insert "Selective"? A. From discussions with my family and friends.

Q. Is the edition of "The Housewives' Handbook on Selective Promiscuity" published by Documentary Books, Inc., one of the defendants in this case, the same textual matter as the edition of "The Housewives' Handbook on Selective Promiscuity" published by Seymour Press? A. With the exception of one paragraph.

Q. What is that? What is the difference? A. My oldest daughter pointed out in the original press I had not mentioned that she had broken her engagement. It was a

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minor, personal family matter. So, I inserted one paragraph [119] in the copy that is there.

Q. And that is the only differential? A. Yes.

Q. Do you still continue to publish "The Housewives' Handbook on Selective Promiscuity" under the label Seymour Press? A. Yes.

Q. When you first published it how did you go about selling it? A. I just sold it to my friends there in Tucson and called them on the telephone, and just made sales that way for the first few weeks.

Q. About how long ago was this? A. It was in August and September of 1960.

Q. How did you sell the book after that? A. Well, then the people that I know, they suggested that since the doctors there had shown an interest in it that I should send out some sort of mailing to doctors. So, I asked Dr. Robert Ellis if he would write an introduction for us and he did, and we did a reprint of that and we used that introduction, a reprint of the introduction and a letter. That is just what we mailed out to doctors and psychologists, and college professors who are the head of psychology departments.

Q. How did you get the names and addresses of persons to whom you would send these brochures? [120] A. We started out just using the yellow pages of the telephone directories. Then we obtained an A. M. A. directory from a doctor in Tucson, and an A. P. A. directory from a psychologist, and went on from there.

Q. Since October of 1960 approximately how many mailing pieces, that is, brochure material have you sent through the United States mail? A. Something over 400,000.

Q. And approximately how many copies have you sold? A. I think it was a little over 12,000.

Q. How were these copies that you sold delivered? A. They are mailed.

Q. Did you ever receive any re-orders for the book from any doctors or institutions who had purchased it

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initially? A. Yes. There are several doctors. Dr. Brian advertises it in their medical journal out of Los Angeles. Dr. Robert Shaw, Dr. Thomas Wardine, the University of Oregon State Medical School; one of the local ministers in Tucson has purchased eight or ten copies. I assume he either sells them—he says he uses them for counseling, but I imagine he sells some of them because his salary isn't great. There are any number that order five or ten copies at a time.

Q. Have you ever been contacted by officials or representatives of the Post Office Department with regard to your mailing [121] this book or the brochure material?

Mr. Creamer: That is objected to.

By Mr. Dickstein:

Q. —soliciting sales?

Mr. Creamer: That is objected to. I think it is immaterial, irrelevant.

The Court: Sustained.

By Mr. Dickstein:

Q. Mrs. Serett, what was your purpose in writing this book? A. Well, after I read the Kinsey reports I sort of had my belief confirmed that woman's role in sex is widely misunderstood. I hoped that my book written in a language that a lay person can understand could communicate several facts and these would be primarily for women, and one of them would be that the sexual activities and attitudes that the women have are not unusual or unique. They are not different, and another was that various forms of sexual expression are normal and healthy things to do, and also that women do have sexual rights.

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Q. Mrs. Serett, is this a work of fiction? A. No. I have lived every single minute of it.

Mr. Dickstein: No further questions.

The Court: What is the last you said?

The Witness: I have lived every minute of it, or every page of it except the introduction by Dr. Ellis and [122] the introduction by my daughter. That is a postscript.

Mr. Creamer: The Government has no questions, Your Honor.

* * *

[124] Mr. Dickstein: The defendants now call Mr. Dwight Macdonald to the stand.

DWIGHT MACDONALD, SWORN.

Direct examination by Mr. Dickstein:

Q. Mr. Macdonald, where did you receive your college degree? A. Yale in 1928.

Q. What did you do after that? A. Well, I first—I went to—I got a job for six years on Fortune. I was a staff writer on Fortune Magazine, and then I was for another six years an associate editor [125] of Partisan Review, a literary—

Q. What period of time was that? A. The Partisan Review was roughly from '38 to '43.

Q. And what did you do thereafter? A. And then from '43 to '49 I published my own magazine called Politics.

Q. What was the subject matter of Politics? A. Well—

Q. Was it strictly limited to politics? A. No, not at all. It was much broader. It was partly literary and partly sociological. I used "politics" in the Greek sense of Aristotle and so on.

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And after that, '51, on, I have been a staff writer on the New Yorker Magazine.

The Court: On what?

The Witness: The New Yorker Magazine.

By Mr. Dickstein:

Q. Since 1951 have you been associated with any other periodicals or publications? A. Yes, I have been for one year an associate editor of Encounter Magazine which is a literary political magazine in London, and I have been for the last three years the film critic of Esquire Magazine.

[126] Q. Have you ever done film criticisms or articles on motion pictures prior to your association with Esquire Magazine? A. Yes, I first started writing about the movies in 1929. I didn't do regular film criticisms but I wrote articles for various highbrow magazines of very small circulation.

Q. In what publications have your literary criticisms appeared?

Mr. Creamer: Objection, Your Honor. I haven't heard of any literary criticisms so far.

The Court: I missed the question. I was reading something else. Will you repeat it, please?

Mr. Dickstein: I will withdraw the question, Your Honor.

The Court: Very good.

By Mr. Dickstein:

Q. Have you written literary criticisms? A. Yes.

Q. In what publications have your literary criticisms appeared? A. Well, in the Phillips Exeter Monthly, in the Yale Literary Magazine, and the Symposium, of course,

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Partisan Review which is a literary magazine, the Forum, the New Yorker, [127] Encounter. That's all I can think of at the moment.

Q. What about Commentary? A. Oh, yes, Commentary, yes.

Q. What about Esquire? A. No, not in Esquire.

Q. Did you publish a recent article in Esquire Magazine dealing with the New York Times? A. Yes, I did.

Q. What was the subject matter of that article? A. Well, it actually dealt only with the New York Times Sunday Book Review. It didn't deal with the Times in general. It was a criticism of the Sunday Times Book-Review which is our most influential and largest circulation critical journal in this country. It was a criticism of it as being extremely poor.

Q. When did that article appear? A. Well, the issue before last and the issue before that; it was in two.

Q. Have you published any books? A. Yes, I have.

Q. What books have you written and published? A. Well, do you want me to name—well—

Q. Yes. [128] A. "Henry Wallace, the Man and the Myth," "Memoirs of a Revolutionist," "Against the American Grain,"—that's my current book; it is a collection of mostly literary essays written over the last ten years, and I edited an anthology of parodies that Random House published three years ago. I think that's about it.

Q. Have you had any lecturing activities? A. Yes, in the last two years I have had a great deal.

Q. Before what types of groups and covering with subject matters? A. Well, almost entirely before college audiences and covering either the movies or the use of English, that is, English usage really, or the question of mass culture and middlebrow culture, especially mass culture, that's one of my main interests, the influence of mass culture on serious or high culture.

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Q. Before what colleges have you delivered this lecture or these lectures? A. Oh, Yale, Harvard, University of Texas, University—Washington & Lee, Connecticut University, Brandeis, Columbia, University of Chicago. I am going out to the University of California this summer to give a couple of lectures at their invitation.

Q. About how many books a year do you read, Mr. Macdonald? [129] A. Well, it is hard to estimate. I suppose—you mean read fully or read substantially—and I often read a few chapters and then don't go on.

Q. Read as someone engaged in your professional life would read. A. Yes. Well, I suppose that I read either fully or in part, in good part, I suppose about 200 perhaps. It is very hard to know, but I suppose I must read five books a week, I guess.

Q. During the period of time that you have been an observer and a critic of the literary scene have you seen any change or movement in the permissible limits of sexual candor in our literature? A. Yes, I have seen a remarkable change, rather, a remarkable extension of these limits. In fact, it has been especially pronounced in the last five or six years, but perhaps the best way to express it is taking three novels that have been published at different periods.

Kathleen Winsor wrote a cheap and sensational novel called "Forever Amber" which was quite a success at the time because it was allegedly very sexy. When you read that now you really wonder what they thought was sexy in the light of what we have had later. That was about 1946 I would guess.

[130] And then about six or seven years ago another completely untalented lady writer named Grace Metallious wrote a book called "Peyton Place" which went much farther than Kathleen Winsor had and there was no question of suppressing or anything like that.

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And now, just like that we have the old established firm of G. P. Putnam in New York publishing memoirs of a woman of pleasure, a lady of pleasure, otherwise known as "Fanny Hill," which was written in the 18th century and which up to this point has always been considered what is called hard core pornography. I don't personally think it is, but that's another question, but anyway, the fact that a respectable and very old publishing house in New York would publish a book of this kind is extremely significant, so from "Forever Amber" to "Fanny Hill" is quite a stretch.

And then I think that you could—another important change in the last decade or so was the appearance of the famous Kinsey Report. That was about 12 or 13 years ago. The Kinsey Report was very important because it showed that the conventional American morality was one thing and what people actually did sexually was a quite different thing, and I think the Kinsey Report must be to some extent responsible for the rapid liberalization of our standards on these matters [131] in the last decade, and this liberalization has been shown in a whole series of court decisions in different fields.

Q. Well, how does this liberalization as you put it affect the world literature? A. Well, it has affected it—well, I just gave this one example.

Another striking example within the last four or five years is the publication of William Burroughs' "Naked Lunch," which is an extremely, really a sick book. It has a considerable amount of literary merit, and I suppose that was the reason that no legal objection was taken to it. I really was surprised because "Naked Lunch" had always been published under the counter even in Paris and so on.

That's one, and then another example is the publication of Henry Miller's "Tropic of Cancer" which was banned from this country, of course, and another one was the publication of "Lady Chatterley's Lover" by D. H. Lawrence.

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[132] *By Mr. Dickstein:*

Q. To your knowledge, is "Naked Lunch" freely distributed and available throughout most of the United States?

Mr. Creamer: That is objected to, Your Honor. I think it is irrelevant and immaterial.

The Court: We will hear it. Objection overruled.

The Witness: Sir?

The Witness: Well, I don't know.

By Mr. Dickstein:

Q. Do you go in many bookstores, Mr. Macdonald? A. Yes, but I don't remember seeing "Naked Lunch" there. I see the other two, but not "Naked Lunch."

Q. What about "Trophic of Cancer"? A. Oh, heavens, that was everywhere for a while. You couldn't walk into any drug store anywhere without seeing the blue covers. They had a red seal, as I remember. In fact, on trains the train butcher would go through with "Life" and "Time" and the "New Yorker," and right in front a couple of copies of Henry Miller's sex book, so to speak, which was very ironical, because, from a literary point of view, it is an advanced novel, and the fact that they would be able to sell it on trains, really—

[133] Q. What about "Lady Chatterly's Lover"; was that freely sold throughout the United States? A. Yes, and certainly, to my knowledge, in England—in England, in fact, the year it came out, there were two best sellers in England, and one of them was the Penguin edition of "Lady Chatterley's Lover," and the other was the "Oxford New Translation of the Bible." These were the two top best sellers.

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Q. Mr. Macdonald, as an observer of the literary scene have you also seen some dynamics in the sense in which you have been testifying in the field of periodical publications in, let us say, the time since the revocation of "Esquire's" 2nd-class mail permit in 1954 to the present day? A. Yes, I have, yes. Of course, the post office's attempt there to deny "Esquire" mailing privileges and thus, in effect, make it impossible to publish it was turned back by the courts. The reason that the—I suppose the reason for this prosecution of "Esquire" at that time was that "Esquire" at that time was still publishing the so-called Petty girls and Varga girls which seemed to me rather mild, but I don't know any other possibility. But now you have freely circulated throughout the United States a whole series of girly magazines, so called. "Playboy" was the first one, and "Playboy" now has a 2,000,000 circulation, and of course, has started all these ridiculous Playboy Clubs, and is a tremendous success. I should say, [134] judging by the ones I have noticed on the New York newsstands and elsewhere there must be between twenty and thirty of these that come out every month, and their main purpose is to purvey from six to twelve nude, colored nude pictures of models. A few years ago, six or seven years ago—I am a student of mass culture. I follow all these phenomena, and the girly magazines then, I think the models had to wear brassieres and panties, and now they don't have to wear brassieres. I mean, they can expose their bosoms now. Of course, they have to—I mean, they can't be actually nude from the front, anyway, but that will perhaps come.

Q. Have you seen any movement of a similar nature in the motion pictures that the American public sees? A. Yes. In the motion picture it is especially notable because of the fact that after the Fatty Arbuckle scandal in the twenties Hollywood got on Will Hayes to clean it up and become the czar, and Hayes introduced the so-

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called "Hayes Code" which, as you know, is a code of morality, what could and could not be shown in the movies. It is extremely explicit about both in a physical sense that can be exposed on the body, and also in a plot. The Hayes Code says you can not show two people living together who are not married.

Q. Did it also say you couldn't show a husband and wife in a single bed? [135] A. Yes, as I recall it. Oh, yes, not people of the opposite sexes at all. Anyway, the Hayes Code now has been called the Hayes-Breen Code, Breen succeeding Hayes. Well, when was "The Outlaw," the Jane Russell picture that Howard Hughes produced? I would say that was about twelve to fifteen years ago. "The Outlaw" was the first picture to defy the code and thus not get a seal of—the Motion Picture Producers' Association gives a seal that is all right to circulate. Hughes more or less got away with it. He made money on the film, but since then "The Outlaw" now seems very mild compared to what is permitted. The Hayes-Breen Code in the last four or five years has been completely riddled. It hardly exists any more. In fact, I saw a movie about a year ago and reviewed it in "Esquire" called "Cape Fear" which is distributed. I think it even had a seal. The point of the movie is the harassment, sexually and sadistically, of a mother and her eleven-year-old daughter by a really morally degenerate ex-convict who wants to revenge himself on the father who had him sent to prison. The climactic scene obviously suggests that he gets each the girl separately and the mother in a remote country district and it is obviously suggests that he rapes them. Of course, they cut it short. The girl gets away some way or other, and the husband comes along just in time, but this would never have been allowed a few years ago. I am not so sure it should be allowed [136] now, this particular picture.

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Q. Because it is a bad movie? A. No. It was rather well directed. I don't mind sexuality, but I think the sadistics in it is one of the main points of pornography, and is what I objected to.

Q. Have you seen the motion picture "Irma La Douce"? A. Yes, a press preview about a week ago.

Q. What is the subject matter of that? A. Prostitution.

Q. Have you seen the motion picture "Never On Sunday"? A. Yes.

Q. What is the subject matter of that motion picture?

A. The same. Of course, the difference is that was made abroad and didn't need any Academy seal. Furthermore, "Irma La Douce" treats prostitution in a light way. It is not a very awful film, really, except that it does open with three scenes of Shirley McLaine before and after her transacting with her customers. There is no question about what was happening, and in fact, the whole dialogue points it up.

Q. Can you point to any other motion pictures which illustrate this? A. Well, of imported films which are freely shown in this country, "Phaedra," which has a very explicit scene of sexual intercourse. I mean explicit in the sense it is, of course, [137] done through flames and water and so on, but still—and "The Lovers," I think that has been banned in a few states, and, well—transvestism is obviously the main theme of the Marilyn Monroe movie, "Some Like It Hot," that Billy Wilder made three or four years ago. I mean, these two men dress up as members of a women's band in order to escape bandits, but still it is—

Q. Mr. Macdonald, have you ever read "The Housewife's Handbook of Selective Promiscuity"? A. Yes, I have.

Q. In your opinion, does "The Housewife's Handbook" go substantially beyond the customary limits of candor

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that society, American society, our country, permits in its literature at this particular point of time?

Mr. Creamer: I object, Your Honor, on the basis that this witness is not qualified to testify as to the community standards as stated in the question.

The Court: I will permit it. The value of the testimony will be up to me considering the background.

Mr. Creamer: And it is also a part of the ultimate question.

The Court: That's right. Objection overruled. Exception noted for the United States.

The Witness: Well, speaking as a long-time [138] student of mass culture in American society I would say it does not.

By Mr. Dickstein:

Q. Have you seen "Liaison" Volume 1, No. 1? A. May I add something to the other reply?

Q. Please. A. I must also say, quite frankly, that I consider it not a particularly interesting book. It has no literary value, I would say. I think its only importance would be as a case history which certain doctors and gynecologists and so on would find of interest, but I don't want to be put in a position—I was going to compare it with "Lady Chatterley's Lover," saying it is more explicit than this, and this is true. On the other hand, "Lady Chatterley's Lover" certainly is a work of literary art. This is not.

Q. Was it your statement that you had read "Liaison" Volume 1, Issue 1? A. Yes, I have.

Q. Based upon your observations of the literary scene and the particular place we are in our culture today,

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would you say that Volume 1, No. 1, goes substantially beyond the customary limits of candor which we tolerate today in describing or discussing sexual matters?

Mr. Creamer: Objection, Your Honor, on the [139] grounds as stated.

The Court: Overruled.

The Witness: No, I would not, but I must also add that I think it was an extremely tasteless, vulgar and repulsive issue. Later issues, I have looked through the whole file. Later issues seem completely unobjectionable even from that point of view, but the fact that it is tasteless and vulgar doesn't, in my mind, make it obscene or pornographic.

By Mr. Dickstein:

Q. Is it within the limits of sexual discussion that we see in other works and material that is freely circulated within the United States? A. I am sorry. Is it what?

Mr. Dickstein: Would you read the question?
(The last question was read by the reporter.)

By Mr. Dickstein:

Q. Is it within the boundaries of that; is it within the limit of that material? A. Is what within the limit?

Q. We are still speaking of "Liaison." A. Oh, I am sorry. Oh, yes. Yes, I would say so. Yes.

Q. Have you read "Eros"? A. Yes, I have.

Q. And by "Eros" I am speaking of Volume 1, No. 4. [140] A. Yes, I have read that.

Q. In your opinion, does "Eros" No. 4 go substantially beyond the customary limits of candor that we in

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our country now tolerate and accept in discussion of sexual matters? A. No. I should say it goes considerably this side of it.

Q. By "this side," you mean considerably within those limits? A. I mean the safe side, the legal side, the nice side.

Q. Mr. Macdonald, would you turn with me to the table of contents of "Eros" Volume 1, No. 4.

The Court: I did not hear the page.

Mr. Dickstein: The table of contents, which would be the first page, Your Honor.

The Court: Thank you.

By Mr. Dickstein:

Q. Referring to that table of contents would you indicate the items that appear in this issue of "Eros" which you believe have significance or note for some literary merit. A. Yes. In fact, I have prepared—since I knew I couldn't remember them—I have prepared a list of them.

Mr. Creamer: If Your Honor please, if the witness is going to read from something I would appreciate it if I may see it first.

The Court: You may do so.

[141] *By Mr. Dickstein:*

Q. Could you do it with the table of contents without your notes and referring back to the publication, if it is necessary for you to refresh yourself on that A. Well, do you want me just to go through it and sort of say—

Q. Yes. A. You want to know the serious and positive things. Well I would say the first, "Love in the Bible" is a series of magnificently reproduced and extremely

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good Medieval and Renaissance woodcuts which I see not only no objection to, but it is a beautiful portfolio.

The next thing is "The Jewel Box Revue", which is some candid-camera shots in color of a revue in which the men are all female impersonators, and obviously homosexuals, I suppose. I thought that was very good, too, and good and interesting pictures.

"The Letter from Allen Ginsberg" is next, which I thought was witty and well expressed, and very typical of Allen Ginsberg.

Q. Who is Allen Ginsberg? A. He is the leading so-called "beat" poet, and has a considerable reputation, I would say, as a poet.

"Was Shakespeare a Homosexual?" was the next [142] article. I have no objection to that from an obscene point of view, but I thought it was a mediocre article.

Q. I am just asking you to characterize— A. Well, oh, the good ones? Yes.

Well, the next thing there was a rather witty thing, "New Twists on Three Great Trysts", which was humorous.

"The Natural Superiority of Women as Eroticists" by Drs. Eberhard W. and Phyllis C. Kronhausen, I thought an extremely interesting and important study with some remarkable quotations from the woman who had put down her sense of love-making, of sexual intercourse, are in an extremely eloquent way. I have never seen this from the woman's point of view. I thought the point they made, the difference between the man's and the woman's approach to sexual intercourse was very well made and very important.

Then "Black and White in Color. A Photographic Tone Poem", by Ralph M. Hattersley, Jr. I suppose if you object to the idea of a Negro and a white person having sex together, then, of course, you would be horrified by it. I don't. From the artistic point of view I thought it was

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very good. In fact, I thought it was done with great taste, and I don't know how to say it—I never heard of him before, but he is obviously an extremely competent and accomplished photographer.

Finally, a sort of adaptation of "Lysistrata" [143] by Aristophanes, an adaptation by Ivan Granzni, I thought was very amusing, and certainly no more outspoken than Dudley Fitz's full translation of the same play which I compared it with recently just for fun.

Q. Is the Dudley Fitz translation freely available in the United States for the American public? A. Oh, yes.

Q. Has it been used in schools? A. Oh, I don't know. I would assume so. Fitz himself is a schoolteacher.

Q. How long has it been in circulation in the United States, to your knowledge? A. I really have no idea. It is not recent. Again, I think I must, if you don't mind, add to what I have said, because I don't want to give the impression that I consider this is all of this issue.

Q. No, I just asked whether or not— A. Well, yes. If you asked me now not specifically, but what else I think about it, I would appreciate it.

Q. I take it there are articles in here that you don't think are of great literary merit? A. Yes. There are a considerable number that, it seems to me, are either rather trivial or poor, and at least one that I consider not worth—"Bawdy Limericks" I don't think are terribly [144] funny, and I think quite vulgar, but again I don't think they are obscene or pornographic.

Q. Would you agree that some people might consider them funny?

Mr. Creamer: That is objected to, your Honor.

The Witness: Well, yes.

By Mr. Dickstein:

Q. Mr. Macdonald, is it not a characteristic of periodicals that going from article to article one can see a fluctuating level of quality regardless of the publication?

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Mr. Creamer: I object, your Honor. I have permitted leading quite a bit, but I really don't think he should lead that much. It is a leading question, and therefore I object.

Mr. Dickstein: Your Honor, I will withdraw the question. I would at this time want to offer in evidence a book entitled "Memoirs of a Woman of Pleasure" by Peter Quennell, published by Putnam and discussed by Mr. Macdonald during the course of his direct testimony.

The Court: You are offering to have it marked?

Mr. Dickstein: I am asking that it be marked for identification.

(Book entitled "Memoirs of a Woman of Pleasure" was marked Exhibit D-9 for identification).

[145] Mr. Dickstein: We offer it in evidence, your Honor.

Mr. Creamer: I object on the basis of my objection yesterday. It is immaterial and not relevant.

The Court: Admitted.

Exception noted.

(Exhibit D-9 received in evidence).

Mr. Dickstein: No further questions.

[146] Mr. Creamer: The Government has no questions, your Honor.

The Court: Thank you, sir.

Mr. Dickstein: The defendants call Arthur Galligan as a witness.

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ARTHUR J. GALLIGAN, SWORN.

Direct examination by Mr. Dickstein:

Q. Mr. Galligan, are you an attorney? A. Yes, sir.

Q. In what jurisdictions are you admitted? A. I am sorry; I didn't hear the question.

Q. In what jurisdictions are you admitted? A. New York and the District of Columbia.

Q. Are you my law partner? A. Yes, sir.

Mr. Creamer: If your Honor please, I request an offer of proof.

The Court: I don't believe it will be necessary in view of the fact that we do not have a jury present.

Mr. Creamer: Very well.

[147] The Court: Whenever you feel that you should object to anything, say so.

Mr. Creamer: Thank you, sir.

The Court: We will rule on problems as they arise.

By Mr. Dickstein:

Q. Did you at my request go about purchasing certain books or go about purchasing certain books and periodicals which were visibly and freely available on newstands, in book stores and other places? A. Yes, sir.

Q. Where did you start your activities? A. New York City.

Q. And where did you go to purchase such books and periodicals? A. I went first to Grand Central Terminal which, as you know, is New York Central Railroad Terminal.

Mr. Creamer: Pardon me, your Honor, not to interrupt the witness, but I would like to object at

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this time because it seems to me we are going to an immaterial and irrelevant area to the purchase of books and magazines.

Mr. Shapiro: Your Honor, it doesn't go to the particular location of purchase but to the free availability of the material we are about to offer for purposes of identification. [148] This is preliminary to our offer of this kind of material.

The Court: Exception noted. We will receive it.

By Mr. Dickstein:

Q. Where did you go within Grand Central Station? A. The Union News stand of which there are many, but right off the main concourse where the passengers who are embarking or disembarking from various trains pass by, from the ticket counter to the tracks, from the Hotel Commodore, passing through the station to exit to the street. Then right outside of the terminal entrance to the Hotel Commodore there is a bookstore called the—well, it is a combination book and card store—called the Beaumart Card & Gift Shop.

Q. May we hold that for a moment?

Did you make any purchases at the Union Newsstand?

A. Yes, sir.

Q. Do you have that material with you? A. Yes, I do.

Q. May we have it, please? A. This magazine called "Rogue" and this book called "Waterfront Blonde" are the two purchases I made at that point.

Q. This is Rogue, issue of May, 1963; is that correct?

A. Yes, sir.

[149] Q. Were both of these openly displayed on the newsstand? A. Yes, sir.

The Court: What is the second book?

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Mr. Dickstein: "Waterfront Blonde."

The Court: "Waterfront"?

Mr. Dickstein: We ask that that be marked as—

The Court: What issue, May or June?

The Witness: No, it is a book.

Mr. Dickstein: It is a book.

We ask that that be marked as Defendant's Exhibit 10 for identification.

("Waterfront Blonde" was marked Exhibit D-10 for identification.)

("Rogue" Magazine was marked Exhibit D-11 for identification.)

By Mr. Dickstein:

Q. Where did you go after you left the Union Newstand?

A. I then went to the Beaumart Card & Gift Shop which I just described which is outside the entrance to the Hotel Commodore.

Q. Did you make any purchase there? A. Yes, sir, I did.

Q. Do you have that material with you? [150] A. Yes, sir, I do.

Q. You have just handed me six pocket books, have you not? A. Yes, sir. Would you like me to read the titles?

Q. No, I will, so the reporter can identify them simultaneously.

Were each of these pocket books freely displayed, openly displayed in that shop? A. Very prominently displayed. As a matter of fact, they could be seen through the glass window. People passing by the passageway leading from the main concourse to the Hotel Commodore—

Mr. Dickstein: We would like to have marked for identification as Defendant's Exhibit D-12 a book entitled "Gang Girl," one of the books that Mr. Galligan has just handed me.

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The Court: "Gang"?

Mr. Dickstein: "Gang Girl."

("Gang Girl" was marked Exhibit D-12 for identification.)

Mr. Dickstein: And as Exhibit D-13 a book entitled "The Sucker," another volume that Mr. Galligan has just handed be.

("The Sucker" was marked Exhibit D-13 for identification.)

[151] Mr. Dickstein: As Exhibit D-14 a book entitled "Pushover," one of the other books that Mr. Galligan has handed me.

("Pushover" was marked Exhibit D-14 for identification.)

Mr. Dickstein: As Exhibit D-15 "Rock-N-Roll Gal."

("Rock-N-Roll Gal" was marked Exhibit D-15 for identification.)

Mr. Dickstein: As Exhibit D-16 a book entitled "They Couldn't Say No."

("They Couldn't Say No" was marked Exhibit D-16 for identification.)

Mr. Dickstein: As Exhibit D-17 a book entitled "Wild Body."

("Wild Body" was marked Exhibit D-17 for identification.)

By Mr. Dickstein:

Q. Where did you go after the Beaumart Book Shop?

A. I left Grand Central Station and I walked over to the

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vicinity of the New York Public Library at 5th Avenue and 42nd Street.

Q. And did you go to any newstand in that area? A. Yes, sir, there are three newstands actually on the [152] south side of 42nd Street between Fifth and Sixth Avenue which are the two blocks which encompass the New York Public Library.

Q. And did you make any purchases at those newstands? A. I did, sir.

Q. Was that of material which was all freely and openly displayed at those newsstands? A. It certainly was.

Q. Do you have that material with you? A. I do.

Q. May we have it, please? A. This material I purchased at the newsstand closest to Fifth Avenue on the south side of 42nd Street right outside the side entrance to the New York Public Library.

Mr. Dickstein: Will the record note that Mr. Galligan has just handed me a number of magazines and I will separately identify them for the record.

As Defendant's Exhibit D-18 for identification, a periodical entitled "Nymph," issue No. 5.

("Nymph," Issue No. 5, was marked Exhibit D-18 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-19 a periodical entitled "Tic-Toc," Volume 1, issue No. 2.

[153] ("Tic-Toc," Volume 1, Issue No. 2, was marked Exhibit D-19 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-20 a periodical entitled "Pastime," Volume 2, No. 5.

("Pastime," Volume 2, No. 5, was marked Exhibit D-20 for identification.)

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Mr. Dickstein: As Exhibit D-21 for identification a periodical entitled "Adam," Volume 7, No. 6.

("Adam," Volume 7, No. 6, was marked Exhibit D-21 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-22 for identification a periodical entitled "Satan's Scrap Book," Volume 1, No. 1.

("Satan's Scrap Book," Volume 1, No. 1, was marked Exhibit D-22 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-23 for identification a periodical entitled "Kiss," No. 2.

("Kiss," No. 2, was marked Exhibit D-23 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-24 for identification a periodical entitled "Stark," Volume 1, No. 1.

("Stark," Volume 1, No. 1, was marked Exhibit [154] D-24 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-25 for identification a periodical entitled "French Frills," Volume 2, No. 5.

("French Frills," Volume 2, No. 5, was marked Exhibit D-25 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-26 for identification a periodical entitled "Hip and Toe," having no other identification.

Oh, I am sorry, inside on page 3 it is identified as Volume 1, No. 2.

("Hip and Toe," Volume 1, No. 2, was marked Exhibit D-26 for identification.)

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Mr. Dickstein: As Defendant's Exhibit D-27 for identification a periodical entitled "Vue," July issue.

("Vue," July issue, was marked Exhibit D-27 for identification.)

Mr. Dickstein: As Exhibit D-28 for identification a periodical entitled "Photo Button," Series 7.

("Photo Button," Series 7, was marked Exhibit D-28 for identification.)

Mr. Dickstein: As Exhibit D-29 for identification a publication called "Treasure Box Revue," Series 18.

[155] ("Treasure Box Revue," Series 18, was marked Exhibit D-29 for identification.)

Mr. Dickstein: As⁴ D-30 for identification the same publication title, Series 19.

("Treasure Box Revue," Series 19, was marked Exhibit D-30 for identification.)

By Mr. Dickstein:

Q. Where did you go after had made these purchases at that particular newsstand? A. I moved down 42nd Street to the newsstand closest to Sixth Avenue which, however, is still on the east side of Sixth Avenue and adjacent to Bryant Park which is right behind the Public Library.

Q. Did you make any purchases there? A. Yes, sir.

Q. May I have that material, please?

The Court: I assume you object? The same ruling.

Mr. Creamer: Yes. He hasn't offered any of these as yet, so I reserve my objection.

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The Court: All right.

Mr. Creamer: I wonder if we could, to save time, leaf through some of these others.

[156] The Court: We will have a recess as soon as all of these are marked because I realize that.

How many more do you have? How many more are you identifying in round numbers?

Mr. Dickstein: It looks like about 15 pieces, Your Honor.

Would the record note that Mr. Galligan has just handed me three periodicals. We ask that they be marked.

As Defendant's Exhibit 31 a periodical entitled "Tip-Top," Volume 2, No. 6.

("Tip-Top," Volume 2, No. 6, was marked Exhibit D-31 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-32 for identification a periodical entitled "Snap," Volume 3, No. 2.

("Snap" Volume 3, No. 2, was marked Exhibit D-32 for identification.)

Mr. Dickstein: As Defendant's Exhibit D-33 for identification a periodical entitled "Twilight," No. 3.

("Twilight," No. 3, was marked Exhibit D-33 for identification.)

By Mr. Dickstein:

Q. Where did you go then, Mr. Galligan? [157] A. From there I went across the street, across Sixth Avenue, still on the south side of 42nd Street, to a bookstore which was about one or two doors removed from the corner, a prominent paperback book store in that location.

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Q. After you completed your trip to New York did you come to Philadelphia? A. Yes, sir, I did.

Q. And did you make any similar purchase to newsstands or bookstores in the City of Philadelphia? A. Yes, sir, I did.

Q. Where did you go first? A. Just one minute, please. My first stop in Philadelphia was at a newsstand on what I believe is the southeast corner of 15th and Market Streets.

Q. Did you make certain purchases at that newsstand? A. Yes, sir, I did.

Q. Was this all material that was on open display on that newsstand? A. It was, sir, some of it.

Q. May I have it please? A. You say "some." I mean this was some of the material on display.

Q. There was other material? [158] A. There was other material.

Q. Similarly on display; is that correct? A. Correct.

Mr. Dickstein: Would the record note that Mr. Galligan has just handed me five periodicals.

We ask to mark for identification as Exhibit D-34 a periodical called "Zoftick," Volume 2, No. 1.

("Zoftick," Volume 2, No. 1, was marked Exhibit D-34 for identification.)

Mr. Dickstein: As Exhibit D-35 for identification a periodical called "Ruby," Volume 1, Issue 1.

("Ruby," Volume 1, Issue 1, was marked Exhibit D-35 for identification.)

Mr. Dickstein: As Exhibit D-36 for identification a periodical entitled "Torch," Volume 2, Issue 1.

("Torch," Volume 2, Issue 1, was marked Exhibit D-36 for identification.)

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Mr. Dickstein: As Exhibit D-37 for identification a periodical entitled "Nude World," Issue No. 6.

("Nude World," Issue No. 6, was marked Exhibit D-37 for identification.)

Mr. Dickstein: As D-38 for identification a periodical entitled "Gymnos," issue of July, 1963.

[159] ("Gymnos," issue of July, 1963, was marked Exhibit D-38 for identification.)

The Court: We will take a ten-minute recess.

(A short recess was taken at 11:00 o'clock A.M.)

[160] *By Mr. Dickstein:*

Q. Where did you go in the City of Philadelphia after that, Mr. Galligan? A. I went to the Mid-City Bookshops located at Ranstead Street and 15th Street.

Q. And did you purchase certain material there? A. Yes, sir, I purchased this book.

Q. Was this book openly displayed in that bookstore? A. Yes, sir.

Q. Along with other material? A. Yes.

Mr. Dickstein: Would the record note that Mr. Galligan has just handed me a book which is actually two books bound in a single cover. One is called "The Wrong Turn," and the other is called "Season of Love." We ask that it be marked for identification as Exhibit D-39.

(A book, double volume, "The Wrong Turn," "Season of Love," was marked Exhibit D-39 for identification.)

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By Mr. Dickstein:

Q. Where did you go then? A. I then stopped at a newsstand at 11th and Chestnut.

Q. And did you purchase certain material there? A. Yes, sir, I did, these three magazines.

Q. Were these three magazines openly displayed on this newsstand? [161] A. Yes.

Mr. Dickstein: Would the reporter show that Mr. Galligan has just handed me the three magazines to which he refers. The first one is "Escapade," August issue. We ask that that be marked for identification as Exhibit D-40.

(A magazine entitled "Escapade," August issue, was marked Exhibit D-40 for identification.)

Mr. Dickstein: The next is "Cavalcade," August 1963. We ask that it be marked for identification as Exhibit D-41.

(A magazine entitled "Cavalcade," August 1963, was marked Exhibit D-41 for identification.)

Mr. Dickstein: The next one is "Scamp," September. We ask that it be marked for identification as D-42.

(A magazine entitled "Scamp," September, was marked Exhibit D-42 for identification.)

By Mr. Dickstein:

Q. Where did you go then? A. I then went to a store entitled, or with the name on the outside, "Discount Books, Inc." also located at 11th and Chestnut.

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Q. Did you purchase anything there? A. Yes. I made this selection from a counter which had on [162] display several hundred magazines of similar type.

Mr. Dickstein: Mr. Galligan has just handed me a periodical called "MR.," annual, spring 1962, which I ask be marked for identification as D-43.

(A magazine entitled "MR.," spring 1962, was marked Exhibit D-43 for identification.)

By Mr. Dickstein:

Q. Where did you go then? A. I then went to another discount bookstore located right here on Market, right down from the courthouse. I am not quite sure of the streets, but it is on the way down to the H. L. Green 5 & 10 Cent Store.

Q. Did you examine the material that was openly on display and available for purchase in that bookstore? A. Yes, sir. The counter, which is their display device, contained the same material that was in the discount bookstore that I previously testified to. There were hundreds and hundreds of these magazines, back-date issues, and so on.

Q. Did you make any additional purchases there? A. No, sir. They were pretty much duplicatory of what I had already seen.

Mr. Dickstein: We now offer in evidence Defendants' Exhibits D-11 through and including D-43.

Mr. Creamer: Objected to, your Honor, on the [163] grounds that these exhibits are irrelevant and immaterial in the case at issue.

The Court: What about D-10?

Mr. Dickstein: I am sorry your Honor. I thought the series started at D-11.

Colloquy of Court and Counsel

The Court: D-10, "Waterfront Blonde."

Mr. Dickstein: Yes. It would start at D-10.

Mr. Shapiro: Do you want to hear from defense counsel on this?

The Court: I believe you will probably say the same thing you said on the other books. What do you plan to say?

Mr. Shapiro: I plan to say somewhat more with respect to this particular material, your Honor.

The Court: You may do it.

Mr. Shapiro: I would like to call the Court's attention to the concurring opinion of Mr. Justice Harlan in *Smith* against California, a case we examined yesterday. I think that the admissibility of this particular material we are talking about now hinges on the understanding of a due-process concept. This is what Justice Harlan says:

This means, regardless of the element of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained [164] here unless the work complained of is found substantially to exceed the limit of candor set by contemporary community standards. The community can not, where liberty of speech and press are at issue, condemn that which is generally tolerated. This being so, it follows that due process, using that term in its primary sense of an opportunity to be heard and to defend a substantive right, requires a state to allow a litigant in some manner to introduce proof on this score while a state is not debarred from regarding the tryer of fact of the embodiment of community standard competent to judge the challenged work against those standards, it is not privileged to rebuff all efforts to enlighten or persuade the tryer.

Colloquy of Court and Counsel

What we are saying, it seems to me here in this case, and in Judge Harlan's opinion in *Manual Enterprises against Day*, which hinged on the concept of patent defensiveness which is to be measured under the federal statute by national community standards, is that if the communities, if the nation tolerates material in terms of offensiveness which is more or similarly offensive than the material which has been indicted, then it is quite clear that under the statute the indicted material can not be found objectionable because due [165] process, as Mr. Harlan points out, can not condemn where liberty of speech and press are at issue, that which it generally tolerates, and this goes to proof of what the community generally tolerates. For that reason we say it is admissible.

Mr. Creamer: If your Honor please, I believe that this is completely non sequitur. That is, to assume that the community tolerates this type of material just because it happens to be published and on the newsstands today, I think doesn't necessarily follow. We have had some dynamic flow and change in the law in the past five years, and just because certain things are being published in no way indicates that the community is tolerating them. There is certainly probably a mass of material in the other direction, and I am sure there is an article in the recent *Saturday Evening Post* concerning just this very problem, how it seems to have escaped the purvey of the law because of the sudden change in law. I in no way feel this indicates any tolerance of society for this type of publication.

The Court: I think that I will receive them, and then I ask that both of you re-argue that before me in your final speeches.

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Mr. Creamer: Thank you.

The Court: But I will let in the evidence, and, therefore, all the exhibits beginning with D-10, "Waterfront [166] Blonde," down to and including D-43, "MR." are admitted.

(Exhibits D-10 through D-43 received in evidence.)

Mr. Dickstein: No further questions.

Mr. Creamer: No questions.

Mr. Dickstein: Defendants call Dr. Peter G. Bennett to the witness stand.

PETER G. BENNETT, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Dickstein:

Q. Dr. Bennett, where did you receive your education?

A. My medical education at the University of Pennsylvania.

Q. Where did you receive your pre-medical education?

A. Haverford College.

Q. Pardon me? A. Haverford College.

Q. When did you graduate from the University of Pennsylvania Medical School? A. 1952.

Q. And what did you do then, sir? [167] A. I took a year of internship at Philadelphia General Hospital, and three years of psychiatric residency under the Philadelphia VA Dean's Committee.

Q. You are now a practicing psychiatrist? A. That's right.

Q. Have you also had training in analysis? A. Yes, I have.

Q. Where was that? A. At the Philadelphia Psychoanalytic Institute in Philadelphia.

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Q. Are you a member of any professional organizations?

A. I am a member of the American Psychiatric Association; the Philadelphia Psychoanalytic Society; the Philadelphia County Psychiatric Society.

Q. Are you presently associated with the University of Pennsylvania School of Medicine and Psychiatry as an instructor? A. That is correct, in the department of psychiatry, section for preventive psychiatry.

Q. Dr. Bennett, can you define pornography for us in psychiatric terms? A. I would like to try. I believe I can if I can make clear the specific psychological effects of pornography on the human mind. What I wish to show is that pornography is not simply an intense stimulation of erotic feelings, although this is part [168] of pornography—

Mr. Creamer: Pardon me. Is the doctor reading?

The Witness: I am referring to notes that I made last night.

Mr. Creamer: I wonder if I would be permitted to see them?

The Court: You may see them.

(The notes were handed to Mr. Creamer.)

Mr. Creamer: Your Honor, I request a voir dire of this witness with regard to this statement.

The Court: All right.

Cross-examination by Mr. Creamer:

Q. Dr. Bennett, who prepared this statement? A. I prepared it myself.

Q. Is there any reason why you couldn't testify without reading from a text? A. Yes.

Q. And what is that, sir? A. Because it is a complicated discussion and I want to—

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The Court: Keep your voice up, because that gentleman over there must hear you, as well as the man in [169] front of you.

The Witness: Certainly.

Because it is a complicated, technical discussion which I am trying to make simple and avoid the use of an excessive amount of psychiatric terminology. I felt that—I do feel that I can make it a lot clearer and a lot more succinct if I refer to the text that you have there. I am willing to testify without it, but I believe it would be a lot clearer with it.

By Mr. Creamer:

Q. Are all of the ideas and expressions in here your own, or did you discuss this request generally with anyone before you prepared this statement? A. Certainly I have discussed it.

Q. And with whom did you discuss it? A. Well, I have discussed it with the attorneys, among other people.

Q. Did you make a number of drafts before you hit upon this statement? A. This is the only draft I—I made another copy which I revised myself at my own—because I wanted to myself, not because I was asked to.

Q. Did the attorneys indicate any areas that they wanted changed, or was anything changed in your initial statement [170] then as is reflected here? A. They didn't indicate that they wanted anything changed. They questioned two points, I believe, that were not clear. I feel that I clarified them.

Q. How many times did you discuss with the attorneys in this case your testimony in this particular document? A. This particular document they haven't seen before ten minutes ago, but the—well, the original copy which is what you are referring to they saw yesterday.

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Q. Yes. A. And we discussed it once at that time. Then prior to that we also discussed the case in general and what I would be called upon to testify concerning, but not this particular document because it hadn't been written at that time.

Q. And what were the changes that you made? Do you have your original document with you, the original draft of this statement? A. I am not sure. I think I do.

Q. Do you recall the changes that were made in the statement? A. Yes.

Q. And what were they? A. Well, in the first paragraph I did not make as clear a distinction between what I am now going to make, a distinction between erotic—the stimulation of erotic feelings per se [171] and pornography as I could have, and actually this is not as a result of their having told me this. I realized this in presenting it to them, and this is why I changed this first paragraph. The only other change that came as a result of our discussion was the elimination of two words which were merely qualifying adjectives which I decided did not accurately portray what I meant.

Mr. Creamer: No objection, Your Honor.

By Mr. Dickstein:

Q. Would you resume your testimony, please, Dr. Bennett.

The Court: Will you start at the beginning, please.

The Witness: Yes. As I was saying, I believe I can make clear the specific psychological effects of pornography on the human mind. What I wish to show is "that pornography is not simply an intense stimulation of erotic feelings. It includes this, of course, but erotic stimulation of itself is definitely

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not harmful or disturbing to the ordinary mature adult, whereas pornography has, always, in addition a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt."

In order to understand the effect of pornography on the human psyche, one must realize that the mind in an extremely [172] sensitive system of checks and balances with many and diverse internal needs and many demands from the external world to attend to. In the average mentally healthy person the functioning of the mind is deceptively smooth, but in everyone there are certain inherent weak points at which a strong external influence can upset the equilibrium. Some of these weak points are specific to the individual and largely attributable to the vagaries and traumatic events of the individual's early childhood. Other weaknesses are actually inherent in the complex make-up of the human psyche and in this sense they are constitutional. Pornography has its morbid effect through both types of weaknesses, although it is the effect on the constitutional type of weakness that I place the most emphasis since it is universal.

First I will describe the weakness which is the result of individual childhood experience, which I will call the specific emotional vulnerability. This is a sort of emotional Achille's heel. Individual conflicts are present in almost everyone, but they are successfully repressed and the emotional irritant is avoided so that there is no clinical evidence of neurosis or mental illness. Nevertheless, in vast social upheavals such as World War II, psychiatrists found that everyone has his breaking point. The prospector who has always been his own boss and can stand

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any physical hardship breaks [173] down when he is placed under unreasonable authority from which there is no escape. The clerk who needs to be told what to do can not function on a lonely patrol where he must make his own decisions. Each has his own specific emotional vulnerability, although they are very different.

A common type of specific emotional vulnerability in our society exists in the area of the sexual drives. It is the remnant of the so-called Victorian attitude toward sex which is fortunately gradually disappearing but still very much a factor in most psychic make-ups. Because children are not informed accurately and naturally about sexual processes when their questions arise, that is ages three, four, five and six, they assume that their questions are naughty and that their sexual curiosity is bad. This only whets the child's curiosity, although the child usually stops asking the questions, and the curiosity itself may be repressed as he grows into adulthood. For a minority, even healthy sex, scientific discussion of sexual processes, and trivial humor on a sexual theme is disturbing. Of course, such persons are violently disturbed by pornography, should they happen upon it, but one can not distinguish pornography by their response, since they are disturbed by almost any erotic stimulation to a greater or lesser degree.

Fortunately for the mental health of the world, [174] the majority of us escape without such serious repression of our sexual curiosity and drives. We find out about sex from friends, eventually from parents, even schools and also from such books as "Housewife's Handbook." As a result the mature person can enjoy sexual relations with a spouse with whom he is intimately emotionally involved in many

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ways, and he can enjoy erotic stimulation from many sources such as novels, movies, jokes, and so forth without any morbid reaction or feeling of shame. Sex takes its rightful part as an important though not the sole contributor to the fullness of life.

But even this average well-adjusted person probably has some deep-seated guilt and shame about some aspects of sex as a result of his early education or lack of it. He is likely to be considerably unsettled by pornography, but he may also be somewhat uneasy about extremely realistic portrayals of sexual intercourse, discussions of homosexuality and so on. Here we can make the first important distinction in the definition of pornography. The anxiety caused by sexual realism will disappear as the person allows himself to become better acquainted with the subject. It is similar to anxiety about any wholly new experience. It may even be turned to a fuller enjoyment of life, as I think might happen to many as a result of reading Mrs. Anthony's book. The discomfort caused by pornography which is not primarily anxiety caused by a new experience [175] will not abate. About all one can develop for true pornography is a distaste.

Now I come to the general, the constitutional characteristic of the mind which is what is primarily attacked and irritated by pornography. Our understanding of the emotional development of man indicates that pornography, much like heroin can have unpleasant effects even in the imaginary perfectly adjusted man. This is because it appeals, like a narcotic to the remnant of infantile narcissism which is present in everyone. By narcissism I mean the selfish wish for total satisfaction without regard for people or responsibility which is characteristic of the new-born child. Always and inevitably the

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process of growing up emotionally is essentially one of relinquishing narcissism and learning, in the school of hard knocks, the sense of well-being one can get from taking responsibility and caring for another person. The average person is not ordinarily bothered by the remnant of infantile narcissism which will always be latent within him. And here we have the outstanding characteristic of pornography. It forcibly stimulates intense narcissistic fantasy by portraying orgiastic sexual and sadistic satisfaction in the most compelling and unreal way. Once begun it is very difficult to resist although it adds nothing to our understanding of ourselves, of others or to the capacity to enjoy sexuality. It is this [176] capacity to be aroused by such morbid fantasy which then provokes guilt, shame, and requires a painful effort to return to the world of reality which makes pornography not only valueless but distressing. Had we not all been infants at one time, no doubt pornography would have no appeal whatsoever, but since we were, we are all vulnerable to its seductive, morbid fantasies.

In summary, although I could list the important themes which are characteristic of pornography, the central test seems to be its capacity to evoke these latent narcissistic impulses which are present in everyone by the use of vivid, exaggerated violent sexual fantasies. The narcissistic impulses which it evokes cause a morbid sense of shame and a desire to regress to infancy to some extent even in the well-adjusted mature adult, whereas erotic realism only causes an erotic stimulation without regression for which the aforementioned individual would feel no shame or guilt.

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By Mr. Dickstein:

Q. Dr. Bennett, in your opinion, could "The Housewife's Handbook" have the requisite or a similar reading of "The Housewife's Handbook" by an average individual have the effect that you describe by the reading of pornographic material? A. No, it—

Mr. Creamer: Objected to, Your Honor, on the [177] basis that the question is hypothecated on the average person, and I do not believe the foundation has been laid for the doctor to testify to the average person. And, also, I object to that portion of his statement which contained a few sentences about the average person on the same grounds.

The Court: I will overrule the objection, and permit the question.

Mr. Dickstein: Would you repeat the question? I will reformulate the question.

By Mr. Dickstein:

Q. Would the reading of "The Housewife's Handbook" by an average person have the effect upon his psyche that you attribute to pornographic material? A. It would not, and I want to make clear that by the average person I mean a mature person, a person who is not mentally ill.

Q. Are most people in our population not mentally ill?

A. That is correct.

Q. Have you read "Eros," Volume 1, Number 4? A. Yes, I have.

Q. Would a reading of this volume by the average person have the same effect as the reading of the pornographic material as you have described?

Mr. Creamer: Objection on the same basis, Your [178] Honor, the average standard.

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The Court: The objection is noted and overruled.

You may answer the question, Doctor.

By Mr. Dickstein:

Q. Your answer, Doctor? A. The reading of "Eros" would not have this effect at all. It would have a very different effect.

Q. Would you say that the predominant effect of "Eros" as a whole would be sexually stimulating on the average individual?

Mr. Creamer: Objected to, Your Honor. That is the ultimate fact in issue.

Mr. Dickstein: Sexually stimulating?

Mr. Creamer: It certainly is well intertwined with the ultimate fact in issue.

The Court: Overruled. Exception noted.

The Witness: Would a predominant effect be sexually stimulating?

By Mr. Dickstein:

Q. Yes. A. That is hard to equalitate. I believe that you have to take a list of the articles. The predominant effect of some of the articles is sexually stimulating, and others not.

Q. Can you make a value judgment as to the predominant effect [179] on an individual who starts on page 1 and reads consecutively to the end of the volume? A. There would be occasional sexual stimulation.

Q. Have you read Volume 1, Number 1, of "Liaison"? A. Yes, I have.

Q. Is there anything in Volume 1, Number 1, of "Liaison" which would sexually stimulate an average in-

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dividual at all without regard to the nature of the stimulation? A. I don't believe so.

Q. Is there anything in "Liaison" that would to the average individual create morbid or shameful or licentious thoughts with respect to that? A. No.

Q. Might it do so on a disturbed person? A. Certainly. Almost anything can create this sort of feeling in a disturbed person. That is the essence of the disturbance, that they are disturbed by something which would not disturb the average individual.

Q. Could you give us an example of the sexual stimuli upon which a disturbed person might possibly act—I don't mean "act," but might possibly function in a mental way? A. Some people are sexually stimulated, for instance, by women's underwear.

Q. You would consider this a sign of mental illness, would [179a] you not, Doctor? A. Yes.

Mr. Dickstein: No further questions.

Mr. Creamer: If Your Honor will bear with me just a moment?

[180] Q. Doctor, in your dissertation on pornography as a psychiatrist sees it, as you see it as a psychiatrist, is your definition pretty much a hard core pornographic definition? A. What do you mean by "a hard core"?

Q. Well, you have it in a letter that you wrote to Mr. Ginzburg. A. Right.

Q. You used the definition "hard core pornography by contemporary national standards." What do you mean? A. In the first place, that's in quotation marks. It is a quotation from Mr. Ginzburg's letter. It is a quotation, I believe, from a Supreme Court decision and that's why I used that phrase. I would not have thought of it myself but—

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Q. But you did in that letter go ahead and define what you thought it was? A. Yes.

Q. Although you didn't know what it was yourself; is that it? A. No.

Q. Well, did your letter go on to describe what— A. I said I would not have used that phrase myself. I didn't say I didn't know what it was.

[181] Q. Well, then, what is it? A. I assume that what it—what was meant by hard core pornography is what I described as pornography in my—all pornography, in other words, in my presentation just now.

Q. Is a factor of your understanding of hard core pornography what the intent of the person producing the material is? A. Is it my understanding that the—

Q. Is that a factor that plays any role or any significant role? A. In the definition of pornography?

Q. In your concept of hard core pornography. A. Not in my definition. No. Is that—

Q. Do you recall writing to Mr. Ginzburg that:

“Returning to the question of pornography specifically, it would seem to me that hard core pornography by contemporary national standards must be evaluated by two measures”—

Mr. Dickstein: I think this letter has been misquoted, your Honor.

The Witness: I have gotten—

Mr. Dickstein: If the witness is to be cross-examined with respect to it I would like the entire statement to be read by Mr. Creamer.

[182] Mr. Creamer: If your Honor please, I think we have had enough reading of statements. The witness has the letter.

Mr. Dickstein: He is referring —

The Court: Just one at a time, gentlemen.

Mr. Dickstein: Sorry.

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Mr. Creamer: If they would like to develop other portions of the letter I think we should take it at that time. I think I have a right to cross-examine him on what he wrote to Mr. Ginzburg.

The Court: You have; you may proceed.

* * *

By Mr. Creamer:

Q. "It must be evaluated by two measures. First there is the intent of the creator. This is not necessarily easy to determine, but if the intent is to [183] communicate ideas or feelings including sexual feelings I would not consider this pornography. If the object is material gain for the creator through an appeal to the sexual curiosity and appetite I would call this book pornography."

Did you write that to Mr. Ginzburg? A. That is correct.

Q. Do you believe that? A. Yes, I believe that. I think it deserves a little explanation in terms of what I have just said.

Q. But you did not testify to it in your direct examination. A. Right. May I explain why I did not feel that this was relevant to the question of the definition of pornography which I gave?

I was responding to the phrase "contemporary national standards," and I was thinking of pornography in terms of what I believe, and I am not an expert on this, were contemporary national standards of pornography, not the psychiatric definition of pornography, and I think that a great many people—this is my non-psychiatric opinion—feel that anything that stimulates sexual curiosity violently is pornography and that they write for the purpose of financial gain material which is defined as pornography by the American [184] society as a whole. This is not a psychiatric definition.

Dr. Peter G. Bennett—for Defendants—Redirect

Q. Do I understand you, Doctor, that your understanding of hard core pornography by contemporary standards embraces the dual concept of sexually stimulating material that is sold with the obvious intent for material gain and economic gain; is that your concept of that phrase? A. My understanding of contemporary national standards is that pornography does include sexually stimulating material sold for financial gain, yes.

Mr. Creamer: No further questions.

Redirect examination by Mr. Dickstein:

Q. Dr. Bennett, in the letter you wrote to Mr. Ginzburg, in the paragraph immediately following the paragraph that Mr. Creamer has been alluding to, did you then proceed to describe pornography in psychiatric terms? A. Yes, and I hope I have made it clear that I don't even agree with my own definition in terms of—I mean, I don't believe that the national standards are a correct definition. I believe it exists but I don't believe that it is psychiatrically sound.

Q. What is a matter of contemporary community standards in the acceptance of literature broadly is not a question within the expertise of psychiatrists, is it, Doctor?

[185] Mr. Creamer: I object, your Honor. I think it is more of a statement than a question.

The Court: Objection sustained.

By Mr. Dickstein:

Q. Are you qualified to testify as to what the American public is reading these days?

Mr. Creamer: Objected to, your Honor, as exceeding the scope of the cross-examination.

Dr. Peter G. Bennett—for Defendants—By the Court

The Court: Overruled.

A. I don't believe so.

By Mr. Dickstein:

Q. Are you a literary expert, Doctor? A. No.

Q. You are a psychiatrist, however? A. Yes.

Mr. Dickstein: No further questions.

Mr. Creamer: No questions, your Honor.

By the Court:

Q. I have some questions, Doctor.

Will you turn to page 207 of the "Housewife's Handbook" and read the first paragraph.

Mr. Shapiro: Did you say 207, your Honor?

The Court: 207.

A. Yes, I have read it.

[186] *By the Court:*

Q. And after reading that what is your reaction? A. My reaction is that the author is describing her initial sexual experiences with a doctor, Dr. Adler.

Q. And it includes in the first line—are you familiar with the definition of sodomy? A. The legal definition?

Q. Yes. A. No, I am not.

Q. "Whoever carnally knows in any manner any animal or bird or carnally knows any male or female person by the anus or by or with the mouth, whoever voluntarily submits to such carnal knowledge, is guilty of sodomy."

Now, that includes having carnal knowledge by mouth; is that right? A. Yes, right.

Dr. Peter G. Bennett—for Defendants—By the Court

Q. Of woman to man, or of man to woman? A. Yes.

Q. And do you think that would have any shameful effect on the reader? A. I do—no, I don't feel that this would cause a shameful reaction in the average reader.

Q. You do not? [187] A. No.

Q. In the average reader, you are talking about— A. Mature person.

Q. Mature person?

Now, if the person was not mature and was 14, 15, or 16, then what? A. That's a good question. I was speaking of maturity actually not in terms of age but in terms of emotional maturity which can be present at 14 and—

Q. Do you think the average person is mature at 14?

A. I think that they are not necessarily going to be disturbed by reading such things as this at 14 and they are not mature in many respects, of course.

Q. Do you think a boy or a girl near 21—would you read that also, then, as well as the next two paragraphs, the next three paragraphs. A. Do I think—

Q. Have you read those? A. Yes.

Q. Do you think that it would suggest to them ways of having sexual intercourse in order to have greater sexual satisfaction? A. Yes, I do.

[188] Q. So far as you are concerned that would be what? A. I feel that would be permissible.

Q. It would be permissible? A. Yes, sir.

Q. Now, then, talking about maturity again, is that mental maturity you are talking about? A. Yes.

Q. Or sexual maturity? A. I am talking about emotional maturity, mental.

Q. Emotional maturity? Would that be in the average person, you think it would be what, about 14 or 16 or 18?

A. Well, I will have to confine what I am saying to a specific area, namely, reading about sexuality, is what is at issue, and I think that the average 14-year-old would not be disturbed by reading this. If they were in a position

Dr. Peter G. Bennett—for Defendants—By the Court

where they were suddenly called upon to do some of the things described here at that age, they would not—they might very well be disturbed but this is not—

Q. Do you think if they read this they then would, with a person of the opposite sex, if that be suggested from this little book, try to do this in order to have greater sexual satisfaction? A. No, I don't believe they would at that age.

Q. You don't think they would? [189] A. No.

Q. When do you think they would start? A. Well, not until after they had been having sexual intercourse in the usual fashion for some time. I think that people only undertake new experiences one thing at a time. They may read about them but they don't necessarily go out and try the whole thing all at once.

Q. Now, this section on age 36, if you go back to page 202, up to the place that you are reading, concerns sexual experiences with one not his or her spouse; is that right? A. I am sure that is right. I remember so seeing.

Q. No, I think you had better check. A. I had better read it?

Yes, that's correct.

Q. If you will read at the bottom of page 206, which seems to answer the question I have asked— A. Excuse me?

Q. "Half-seriously he asked now, 'Why didn't your husband have sex with you?'

'At first he said there are more important things than sex. At the last he said that is for procreation only.'

"Dr. Adler said, 'He's sick.'"

[190] Then go on with the paragraph I have asked you to read. That suggests a moral code, that it is all right to have sexual relations with one not your spouse, is that right, this whole section on Age 36 up to this point? A. I have to follow, but I will say that is what the author's opinion is, right.

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Q. Yes, that is what I am talking about. You are not suggesting this. A. Right.

Q. That is the author's opinion.

Now, do you think that would have any shameful effects on a reader? A. I don't think it would create any shameful effects. It might—

Q. Or suggest to the reader at whatever age that it is morally proper to have sexual relations with a person not his or her spouse? A. No, I think that the reader who is old enough to wade through this book—and by that I mean 12, 13, 14—would recognize that this is the author's opinion but not necessarily the moral code or the code of society.

Q. You have read this book and said that it in your opinion was not obscene, it is not pornographic, and the [191] effects of reading it as a whole or any part of it do not produce the things that you said; is that right? A. That's right, your Honor.

Q. You haven't changed your opinion because of the question I have asked you? A. No, your Honor.

The Court: Any other questions, gentlemen?

Mr. Dickstein: No questions, your Honor, no questions.

Mr. Creamer: No questions, your Honor.

* * *

[192] Mr. Dickstein: The defendants call Reverend George Von Hilsheimer.

GEORGE VON HILSHEIMER, III, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Dickstein:

Q. Reverend Hilsheimer, when were you ordained? A. I was ordained in the Southern Baptist Church in Florida in 1949.

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Q. How old were you? A. I was fourteen at the time.

Q. Was this unusual in the Southern Baptist Church?

A. I would say it was unusual, but not uncommon. A number of my colleagues were also ordained in early or middle teens who belong to a Fundamentalist group which has a group of youthful and untrained ministers.

Q. When did you attend college? [193] A. In 1951 I entered the University of Miami and pursued a course leading to an A. B. with a major in political science and a minor in history and the Russian language and literature.

Q. Did you pursue any graduate course? A. Yes. Under the accelerated course my last year and additional year I studied at the Graduate School of Psychology and took a course of analysis and training therapy at the Granada Psychiatric Clinic under Dr. D. T. Moore.

Q. What did you do after you left the university? A. I matriculated at the University of Chicago as a theological student with specialization in religion and personality.

Q. What was the nature of the course material you studied at the University of Chicago, or studied within the scope of that curriculum? A. At the University of Chicago one takes a core curriculum of theology, church history, the Bible, and so forth, and specializes in a more or less secular field. I chose this course and specialized in the field of psychology, and took my graduate work at the Graduate School of Psychology at the University of Chicago. At the same time I did clinical work as a recorder and therapist at the Child Guidance Center in the Lincoln Center, and as a minister of education of the All Souls Church, also in the Lincoln Center.

Q. During the time you were engaged in this curriculum did [194] you also study at the Washington University in St. Louis? A. Yes. We have a program there of practical training or vicarage, as it is more commonly known, in which you take a year's course as an assistant minister in

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a pulpit, which I did in St. Louis, Missouri, completing my academic work at the Washington University in St. Louis, and I completed my work toward the D. D. there.

Q. When did you receive your divinity degree? A. In 1957.

Q. From what institution? A. The University of Chicago.

Q. What did you do thereafter? A. I spent two years in military intelligence serving Western Europe. During that period I was granted two administrative leaves of absence in order to make a research and study of one of the histories of the free religious societies (Germany) on which I had written my D. D. thesis, and, second, in order to make an extensive survey of lay brotherhoods of service oriented in Europe.

After returning from military service I entered the employ of the American Humanist Association as a minister and group counselor where my work was to travel essentially in the eastern United States setting up demonstrations of group therapy and group dynamics; establishing programs of education, [195] particularly family education and family counseling, and lecturing at universities. During the course of two years I lectured at about seventy-five to one hundred universities and theological schools while traveling in that capacity.

Q. On what subject matters did you lecture? A. I lectured on comparative religion and theology, contemporary morals and, of course, education and therapy. At the end of my period of association I was settled in New York City as the resident minister and group counselor for the Greater New York Humanist Council, and at the same time served as family counselor for the Association for Counseling and Therapy in New York City.

Q. What is the Association for Counseling and Therapy? A. It is a private psychiatric clinic under the direction of a psychiatrist, a medical doctor, in which a team

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technique of a psychiatrist, psychiatric social worker, and psychologist and pastoral counselor or minister is used in both group technique and individual counseling with private patients.

Q. What did you do thereafter? A. This was in August of 1961. I accepted a call to the pulpit of the St. Lutheran Church in Fort Pierce, Florida. I was minister there for a little over a year. While I was there I worked with the Indian Rivermen Health Clinic as a relief, since we had one psychologist for eight counties and [196] a tremendous case load, and during that period along with my ministry I not only carried a case load of about twenty clients per week, a total of about a hundred during the week there, but also developed the Lincoln Park Child Care Center which is a care center giving training and education and care to the children of migrant farmers and other persons of low income status.

Q. Did you also provide pastoral counseling to members of your flock? A. Yes, surely.

Q. When did you leave Fort Pierce? A. In October of 1962 I came to New York City to be the minister in residence of Humanitas, which is a lay brotherhood of service.

I am also the minister of a small Baptist mission on the lower East Side in New York.

Q. Reverend, you are a consultant of President Kennedy's Study Group on National Voluntary Services; is that right? A. I am. That is the so-called Domestic Peace Corps.

Q. What other organizations are you associated with? A. I am a member of the board of directors of Mobilization for Youth, which is the first project established by the President's Committee.

I am a member of the board of directors of the Summer-ville Society, which is a national educational society. [197] I am also the executive director of the Fund for the Migrant

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Children, which maintains child-care programs and investigatory programs concerning the life of the migrant farmer and related people.

Q. Have any of your works been published? A. I have been published in the Journal of Nursery Education; in the Journal of School of Living; in the Humanitas, as well as having written book reviews in the Humanitas and primarily in the St. Louis Post Dispatch.

Q. In your capacity with Humanitas were you called upon to train social workers? A. Well, Humanitas is a—first of all, it is a lay brotherhood of service which one belongs to by contributing at least one percent of your income and one hundred hours of voluntary service per year. The service projects are organized on an autonomous basis. As the minister in residence, I am also an executive director and training officer. We find it necessary to train people in the particular technique in language since the group that we are interested in dealing with is the lowest economic group and presents problems that the average middle-class social worker has not been trained for. So, as a result, a good percentage of my time is spent in the training of social workers.

Q. Do you also do personal consulting to individuals within [198] this society? A. Yes. I work as the pastor and spiritual counselor for most of the young people and the families in our various programs in New York City. There are, of course, programs outside of New York City, but I am the spiritual counselor for a large number of families on the lower East Side.

Q. Reverend von Hilsheimer, is the Christian Church and Christian teaching often blamed for creating sexually regressive attitudes in our Western societies? A. That is a common attitude—

Mr. Creamer: Objection.

The Court: Just a minute.

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Mr. Creamer: I object on the ground it is irrelevant and immaterial.

Mr. Dickstein: I expect to develop the connection of relevancy. It may not be apparent at the moment, but I assure you it will be, if I am permitted to continue into the inquiry. It is merely prefatory, introductory.

The Court: You may move to strike.

Mr. Creamer: Thank you.

The Court: Will you answer the question, Reverend?

Don't talk quite as fast. It is a little difficult. Now, the question may be asked again and you may answer, [199] or we will have the court stenographer ask the question.

(The following question was read by the reporter:

"Q. Reverend von Hilsheimer, is the Christian Church and Christian teaching often blamed for creating sexually regressive attitudes in our Western societies?")

The Witness: It is often so blamed: yes.

By Mr. Dickstein:

Q. To what extent is this widely-held view attributable—

Mr. Creamer: Objection. It hasn't been established this is a widely-held view at all. I think the testimony should come from the witness.

The Court: Objection sustained.

[200] Q. To what extent is this point of view true? A. I would say that essentially it is false, both historically and certainly presently in the mainstream attitude of the Christian church.

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It is, of course, very difficult to talk about the Christian religion. I represent a rather fundamentalist, an individualistic strain of the Reformation. The Roman Catholic church represents another body. Yet we do share a core dogma, a core attitude, and certainly a core morality.

Throughout history there has been a balance between two points of view in the Christian church. One historically has been the one of utter celibacy, the Marcionites, and others. Usually the sects die out after a short time because they produce no children and have few converts.

On the other hand, it has been the view of perfectionists and others who contend that since Christ's sacrifice was perfect, Christians cannot sin and therefore may freely love one another in a carnal fashion.

The church has always existed in its main stream between these two points of view. The point of view represented in America today seems to me to be the culmination [201] of the trend begun with the Reformation.

You may recall that Luther and Zwingli and Calvin all contradicted the point of view of the Roman Catholic Church that the clergy should not marry. This is a first step toward the recognition of sexual needs of individual human beings and was regarded at the time as revolutionary and, of course, Luther's enemies described him as a sex devil and in various other ways this is how the sexual revolutionaries have been described.

In our own time the Christian church in America has gone through a rather curious evolution. First of all, in America the church early became almost irrelevant. Total membership—

Mr. Creamer: Your Honor, I hate to interrupt the witness, but he is talking in terms of the Christian church without defining what he is speaking about. It certainly is not responsive to the question

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that was asked and I am going to ask to move to strike his testimony.

The Court: It may be stricken out as not responsive.

Mr. Creamer: And repeat the question.

Mr. Dickstein: Your Honor, the question I originally asked was to what extent is this point of view, that is, the point of view of the Christian doctrines lead [202] to sexual repressions true?

The Court: He hasn't been asked to give the history of the entire matter. He hasn't been asked to give his views. He may answer the question you asked.

Mr. Dickstein: I think he did at the beginning. Perhaps—

Mr. Creamer: My recollection is he said it wasn't true.

The Court: We will let the record stand as is and ask the next question.

By Mr. Dickstein:

Q. What has been the main line of Christian thinking with regard to sex? A. I think the acceptance—

Mr. Creamer: Objection, Your Honor. I think there should be some qualification as to what he is talking about as far as Christian religion is concerned. I think that it is too broad a question and too general a term.

Mr. Dickstein: I will withdraw the question and attempt to establish a foundation.

By Mr. Dickstein:

Q. Are you familiar with comparative religions, comparative Christian religions particularly? A. Yes, I am.

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[203] Q. You have studied on this subject matter? A. Yes, I have.

Q. You have lectured on the subject matter? A. I have.

Q. Are you specifically acquainted with the sexual attitude evidenced by various Christian groups? A. I am.

Q. Are you specifically acquainted with the attitude, the attitude toward sex, evidenced by various Christian groups for any significant period of time? A. I am.

Q. Commencing with the period of the Reformation, would you please tell us what has been the attitude of Christian groups toward sex, generalizing if possible and showing the exceptions where one cannot generalize. A. The mainstream conviction of Christianity—and I might here say that Christians are those people that believe that Christ is risen, the Son of God and salvation comes through the acceptance of His sacrifice for remission of sins which seems to me a rather simple kind of definition and a clear-enough definition that this is what I am talking about when I speak about a Christian—a Christian point of view is that the human body is the gift of God and that the expression of the human body in legitimate forms is one of [204] the fullest gifts of God, and that the human body should be regarded without shame, without prurience, without undue focusing of attention, but that it should be along with eating and work and play among the great enjoyments which God has given to us in order to enjoy our stay on this earth.

The point of view of many sects has differed considerably. Even at the beginning of the Reformation Calvin was quite repressive in his sexual views. On the other hand, Luther was quite tolerant of sexual behavior. As a matter of fact, there was one of the Renaissance painters right under his window that painted his nudes and representations of the human flesh without any comment from Luther. He would have been burned in Calvin's Geneva.

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Between these two poles we Christians have made our way very torturously with a great deal of fire and thunder from the pulpit on both sides.

In America we have for a number of years been in a situation through our history where the church represented an almost irrelevant minority of Americans. At the end of the Revolution, I believe that less than 7 per cent of Americans were members of the church actively. The clergy as a result were drawn from a very narrow span of American life and religion was increasing unrelated to the life of the people. Now this has changed in this century.

[205] Q. When would you say this change began? A. I would say at least at the end of the second—of the first World War, if not after the end of the Spanish-American War, but around the turn of the century.

Q. And what were the circumstances which induced this change? A. First of all, the upheavals of the industrial revolution and great social change toward urbanization of Americans made our old means of solving human problems almost irrelevant, and the church again began to take on a role of having an open door, of being a possible alternative to large numbers of Americans. From that time the great increase in church membership began until it peaked out or it is claimed that it has peaked out in the late 50's, but there has been a progressive recognition on the one hand by the church that it must relate itself to the lives and needs of people and on the other hand by the people themselves that the church does in fact speak to the detail of their daily lives.

Q. What were the teachings of the Southern Baptist Church at the time you were first ordained? A. When I was a boy we were taught that dancing is sinful and that to kiss a girl is sinful whether you are engaged [206] to her or not, that rather innocent forms of sexual expression are sinful. For instance, at Bob Jones University an uncle

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of mine was forbidden to walk across the campus holding his wife's hand. These were rather common attitudes among the Fundamentalists groups in America a short time ago as 15 to 20 years.

Q. To what extent were these attitudes held by other Protestant denominations at that time? A. I think that my own denomination represented something of a backwash. For instance, when Baylor University and Wake Forest went through a great cataclysmic debate, the student body against the administration, as to whether dancing should be permitted, most Christians in America regarded this as something out of the past. However, it was not very far out of the past because most of our parents and grandparents held this point of view, and it was taught as a religiously valid point of view that dancing, later going to movies, and certainly going to plays, holding of hands, kissing a girl, or these sorts of enjoyment which we regard today as sort of innocent pleasures were all basely immoral and endangering the safety of the soul as well as tending to other kinds of immoral behavior.

Q. Is there any particular point of time at which you can identify the beginning of a substantial increase in pastoral [207] counseling activities as an important function of the ministry. A. In 1941 a book called "The Christian Interpretation of Sex" was written by Charles Piper. At this time this book with its frank appraisal of sex and its Christian interpretation in terms of the fact that sexuality is one of the more beautiful gifts of God was regarded as being very advanced and avant garde. Through the war, of course, there was not a great deal of movement, but a great deal of discussion among those men who were in the chaplaincy and in the Armed Forces. At the end of the war certainly the great majority of chairs in the pastoral theology and pastoral counseling were established in the theological schools of America and the growing concern of the church particularly for problems of family and

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marriage and marriage and pre-marital counseling began to take shape. During the late 40's these were regarded as brash and sometimes unfounded innovations. Today they are regarded as an essential part of theological education. One would not be granted a degree today in 90 per cent of the theological schools in America without having had a course in pastoral psychology which dealt directly and frankly with the sexual problems of individuals.

I think that partially again we had a large [208] group of men come into the ministry at the end of the war who would not otherwise have come into the ministry, men who had confronted a new social order and new social problems and had been brought very crisply up against questions of moral propriety. These were men also who would not except for the G. I. Bill have been educated ministers. This is particularly true of the Southern Baptists and other Fundamentalist denominations which represent, I might add in the largest numbers the greatest body of Protestants in America. These men brought a new awareness to the church of the needs of people and—

Q. And how did that awareness act upon the church's or the organized church's attitudes and teachings with respect to sex? A. Sex had not been mentioned in the church for at least 50 years in America except in the phrases such as "The Virgin Mary" and so forth describing in a very limited way some of the sexual doctrine of the church. The kind of pastoral guidance that was given was of a very abstract and so-called spiritualized nature. It did not deal specifically with the problems which human beings face.

By the influx of a whole new body of members and a whole new body of the clergy, the church began to realize that the institutions which in the past had solved [209] family problems were not solving them. First of all, the family is not what it was 40 years ago. It is not even what it was when I was a boy which is not very long ago. It does not have the strength. It simply does not have the size. It

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doesn't have the same relationship between the generations so that problems which in the past could have been solved by the family itself were now seen as the legitimate prerogative of the church to enter in and to talk about.

Now, we learned when we were dealing directly with people in this way that you cannot generalize when speaking to people but that when a child comes to you and asks you about certain passages in the Bible you must be able to describe exactly what the Bible means, exactly what the moral issue is at stake, and you cannot do this abstractedly if it is to have benefit for mother or her child. If a mother comes to you with the direct questions as mothers had not in the past because (1) they were afraid to speak to a minister in this way and (2) they were simply too modest to speak of such things on the whole and (3) the family had solved these problems more effectively certainly than it did after the Second World War—

If a mother comes to you with specific questions about, "What do I tell my daughter, what do I tell [210] my son, what kind of relationship do I have with my husband", you must be able to answer these clearly, explicitly, in terms these people understand, and the church has come not only to tolerate an openness about sexuality but to take an aggressive stance, where almost every church in America now has courses in sexual education and it is regarded as the normal and proper and necessary thing for churches to do, to give instructions not only in morality but in the technique and discipline and art and relationship of love and marriage and the relationship between two human beings of the opposite sex.

Q. What is the predominant Protestant attitude, and I am speaking of a clerical attitude, at this particular point of time toward the enjoyment of sex between man and wife? A. The typical Protestant attitude is represented particularly in those churches which are in the National

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Council of Churches which contains a great majority of Protestants, has been summed up a number of times by them, and it is essentially this, that between married couples nothing which does not violate the integrity and wishes and the physical autonomy of another partner is immoral, that two human beings may enjoy one another and should and must, and that the function of the church is to guarantee this enjoyment as one of the important bedrocks of marriage, not the most important [211] or the only one, but as one of the most important foundations on which marriage rests, that the enjoyment of sexuality is one of the great gifts of God, and that to teach shame, to teach a prurient inability directly to face the issues of sexuality, is not only wrong but is basically immoral and heretical.

Q. Heretical, you say? A. Heretical.

Q. Do you know the teaching of the Roman Catholic Church on this subject in this particular point of time?

A. It is always difficult for an outsider to speak too clearly about the Roman Church (1) because the Roman Catholic is not the monolithic organization that most outsiders think, and also because it has a great complexity and it has its own discipline, but I think that I can say in terms of—

Mr. Creamer: Objection, your Honor. I think he has already indicated that he cannot render any kind of an intelligent discussion of what the Roman Church stands for by his own preamble at this time. Therefore, I don't think he should be permitted to guess or conjecture as to what the position of the Catholic Church is.

The Court: Do you have anything to say, sir?

Mr. Dickstein: Your Honor, I did not—

[212] The Court: Go ahead, I am speaking to you.

Mr. Dickstein: I did not understand the Reverend Von Hilsheimer was about to guess and con-

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jecture. I think he was about to talk about the obvious manifestations of the Catholics' attitude toward sex which are apparent in their own publications, which are apparent through what the Roman Church is teaching and advocating at this particular point in time, material which is publicly available but available specifically to him and knowledgeable to him because of his Christian background and profession.

The Court: I didn't know it to be that way.

Mr. Creamer: I didn't understand it to be that way, either, your Honor. This is the first time I have heard it. If he has read any Catholic publications at all—

The Court: We will permit him to testify what he has gathered from what he has read.

Mr. Creamer: This is the first time it has come up, your Honor.

The Court: It would be a matter of opinion, his opinion of what he has read, but no more than that. If he limits his testimony to that I would think that I will not sustain the objection, but I will limit him to what he has [213] read, his opinion of what he has read from books, pamphlets, or if he has talked with someone.

Mr. Dickstein: I will put a foundation question on the record, your Honor.

By Mr. Dickstein:

Q. What are the sources that you have, sources of information that you have employed, in arriving at any opinion or understanding of the Roman Catholics' present attitude toward sexual enjoyment? A. First of all, as a direct experience with Catholic social workers and Catholic priests and Catholic agencies, I worked very closely on

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the President's Study Group with Father Duggan on The Bishop's Committee on Migratory Labor, I am very familiar with the Catholic technique, Catholic attitude and the Catholic point of view as represented in their social work and ministry to the migrants since we have a large number of cooperative enterprises there. I am familiar with such organizations as the Catholic Youth Organization and their subsidiary efforts in my work with slum children on the Lower East Side of New York and elsewhere. Here again I have detailed information and experience about the attitude of the representatives of the church and the techniques they use in relating to children and adults with sexual problems. I have also, of course, been a student of comparative [214] theology and I would base anything that I have to say on a Catholic moral position on "Jones' Compendium of Moral Theology" which is the exhaustive and leading authority in Catholic theology and moral—particularly moral theology.

Q. Based upon these various sources of information would you tell us what the prevalent Catholic viewpoint is at this particular time from an American Catholic viewpoint towards sex and sexuality? A. Again the Roman Church represents as its belief and its practice in social work that to invest children with a sense of shame around the area of sexuality is immoral and heretical, that the enjoyment of sex in marriage is moral and necessary and, indeed, there has even been an evolution in those social agencies advocating the teaching the rhythm method of birth control in that the families may be limited and yet sex may be enjoyed without the primary end of reproduction so long as unnatural means are not interposed in order to prevent a natural result.

The teachings in Catholic schools and the operations of Catholic social work agencies are frankly and directly as to approach the questions of sexuality, to speak in a language that the children understand which particularly

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[215] in the slums is the language of the streets, and to regard judgmental teaching about sex within the proper framework, a legitimate expression of sexuality in marriage is the necessary thing for a Catholic worker to do.

There is, of course, a different flavor in Catholic education and social work. They tend to have many more sexually segregated schools and programs. Yet even here every effort is made for them to approach material dealing with family life and the necessities of marriage gently, without shame and frankly, directly, using language that the people can understand.

Q. When did you first see "The Housewife's Handbook On Selective Promiscuity"? A. I saw it in 1960 when I was working as a counselor for the Association of Counseling in Therapy and with the Greater New York Humanist Council.

Q. How did you come to see a copy of it? A. One of my colleagues handed me a copy as a useful tool in therapy.

Q. Have you used the work in therapy in counseling work? A. I have used the work since it was first introduced to me and since I first read it insistently in my pastoral counseling and in my formal psychological counseling.

[216] Q. And how have you used the work? A. I have used it particularly in the cases of married women who almost inevitably are invested with a tremendous sense of shame and guiltiness about the sexual imagaries and values and experiences that they have had. I have used it as a means to ventilate and reduce this sense of shamefulfulness, this sense of debilitating guilt, and this sense of prurience which has been developed out of their training and experiences.

Q. Do you believe that the work tends to relieve this sense of shame on the average, on the people with whom you have used it? A. Yes, this is its most important value and this is the reason that I use it.

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Q. What do you think the teachings of the book are to the average person with whom you used the book? A. The book is a history, a very unhappy history, of a series of sexual and psychological misadventures and the encounter of a quite typical and average American woman with quite typical and average American men. The fact that the book itself is the history of a woman who has had sexual adventures outside the normally accepted bounds of marriage which, of course for most Americans today, is a sort of serial polygamy, it does not teach or advocate this, [217] but gives the women to whom I give the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual, and that they themselves should not be guilty because they are, what they say, sexual failures. I think it is necessary to see, No. 1, that the prevalent sexual experience of the average middle American woman in my experience and also in all the literature of pastoral psychology is one of frustration and failure and incompetence based upon a bedrock of guilt and ignorance.

Now, this guilt is not simply a sexual guilt. Most people have sexual fantasies, sexual desires, and have been taught sometimes that these desires in themselves are immoral. I think our current position in pastoral theology is that of psychotherapy and psychoanalysis that such fantasies, that such desires are not in and of themselves immoral and should be ventilated, that they should be brought out and talked about and thrown away, as it were.

Now, here is a book that comes along in language that these people can understand and says, "This is what happened to me, this terrible thing and this failing thing and this ignorant thing and this unfeeling, insensitive, incompetent man did this to me and did that to me, and I did this to him."

Now, whether or not the woman has an experience [218] of sexual misadventure, she does have an experience

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of sexual desire, an experience of sexual thought in fantasy, and she does have guilt both about her sexuality and almost always guilt about her failure to satisfy the man, to be competent as a human being. Then we cast this in the framework of the culture in which our people are raised and this is particularly true for the average middle American. Women particularly are taught that marriage is the key almost to everything. We have an almost idolatrous concept of marriage in our country. Little girls are told practically from the moment of birth that this is the one road to happiness and almost to salvation. They are told that somehow a mystical, magical experience is going to occur with this marriage that was made in heaven, which is a heretical theological notion in itself. They will meet the man of their dreams, he will be perfect for them, they will marry and things will be lovely and beautiful thereafter. They are told this by comic books, by television, by movies, by every possible medium of the public culture. They are told a lie. They are told a myth. They are told an idolatry in the theological sense because the facts are not these, and they are totally unprepared for the harsh, grim realities of a world where they have not been competent, given competencies, not only [219] competencies sexually but in every other area of the great needs that two human beings have when they form a life together.

Now, it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, "You are not alone. This is the experience of many, many people", and it gives a certain amount of hopefulness to it.

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It is in my mind theologically quite an innocent book. There is no sense of shame involved in it. There is no sense of prurience involved in it. There is no sense of wallowing in sexuality simply for its own sake but it is a simple, straightforward recount of a fairly unhappy history of a fairly typical woman, and I can say based on my clinical experience and the experience of my colleagues and the literature that this book is not drawn far from the average middle American experience whether involved with one or several partners.

[220] Q. Are you acquainted with the standard forms of marriage manuals? A. Yes, I am.

Q. To what extent do these books help you in the counseling activity? A. I find them totally unhelpful.

Q. Why do you say that, Reverend? A. First of all, these are couched in ambiguous language which gives no help or guidance at all.

Secondly, they deal with the physiognomy, the plumbing of sex. They take it on a high, rational plain. They sensitize it and put it in the laboratory and again create a certain kind of romantic and clinical illusion which is not true and therefore leads to a kind of disillusionment and cynicism once marriage is entered into. They speak in language, finally, that is inappropriate to the great majority of Americans. They speak in the language that is utterly foreign to the majority of people that I now work with, but they do speak in a language too complicated and abstract and technical for the average American. This is even many of the counseling handbooks such as "Love Without Fear" or "Christian Interpretation of Sex" or "A Marriage Manual," or others which are used generally and are rated as being designed for the average man and woman.

[221] Mr. Dickstein: No further questions. Thank you.

The Court: Cross-examination, please.

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Cross-examination by Mr. Creamer:

Q. Reverend, I think you indicated that—just one minute, please—up until the end of the First World War the Christian Church was an irrelevant minority in this country. Is that your statement? A. I said essentially in terms of membership it was.

Q. Then this country was not predominantly a Christian nation from the time of the Revolution to the time of the end of the First World War; is that your testimony? A. That is certainly true, yes. As a matter of fact, most ministers do not regard it as a fully Christian nation today.

Mr. Creamer: I move that that be stricken. I didn't ask that question.

The Court: I will consider it with the other testimony.

By Mr. Creamer:

Q. In part of your dissertation you indicated that your concept of the Christian churches is that they are tolerating openness in sex and taking an open stance on sex, and that you indicated that they were going into the techniques and the [222] discipline of sex and love. Do you regard the Christian Church today teaching discipline from what you have just been talking about? Do you teach any discipline yourself in your pastoral exercises? A. I am afraid I don't quite follow the question.

Q. You indicated that the Christian Church, as you saw it, had a tolerant openness towards sex. It was taking an open stance on sex, and then you gave a brief statement that the Christian churches were going into the techniques and disciplines of sex and love. Now I am asking you what you meant by "disciplines" there. A. Yes.

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Q. Is there any discipline? A. I think what I did say, that this church is not only tolerant but taking an aggressive point of view in seeing that it is one of its obligations to teach the techniques and disciplines and arts of love, and the relationship between the family and between the members of the families. In this sense discipline comes to mean the structured, Christian point of view about sexuality which is the legitimate, excellent situation which exists in the framework of a happy, non-prurient marriage which forecloses licentiousness, enjoys that which God has given it, and that is what I meant by "discipline."

Q. That is sexual discipline within the family? [223]

A. That is the Christian point of view, yes, the mainstream Christian point of view.

Q. How does that coincide with the various sexual episodes in this book where the large majority of them are extramarital in nature? How does one counsel people who presumably have a sexual problem by presenting to them a mass of extramarital engagements? A. In the same way that one teaches them moral decency and enjoyment by giving them the Bible to read. If you wish to take the Bible apart and take its various sections you can very much confuse the faithful. There are sections in it which appear to advocate this and the other thing. I do not use this handbook as a blueprint for what you are now supposed to do. I use it as a means to ventilate the sense of shame. I use it as a means to ventilate the sense of guilt essentially about fantasies about things which never happened and about the frustrations and failures which most American women and American men seem to have in their marital and sexual relationships. The main value of this book is quite irrelevant to its author's point of view and its author's theology which she does have and is implicit and positive in a free country to express. The main value is that in quite simple terms it discusses things which are

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not ordinarily discussed, and it particularly points out frustration after frustration. If anything, it teaches [224] that this kind of sexuality is not likely to be very enjoyable.

Q. In using your book with the people that evidently have problems do you supervise them or do you just hand them the book? What do you do? A. The book is given to them within the framework of my relationship with them. I generally indicate this is a book describing the life of a woman who seems to be fairly typical and usual with some comment, "If you think you have difficulties; if you think you have frustrations; if you think you have limitations; if you think you have guilts, then look at the book in this way and see what it has to teach you." It also has values in teaching specifically the terminology and the structure of the sex and sex relationships, but basically within that framework. I do not supervise, since I belong to a religious organization that believes people can read freely and have the ability to solve their own problems without my intimate and daily guidance.

Q. So, the fact that it has adultery throughout you don't comment upon, and that has no effect upon your parishoners? A. This is part of the material that we may discuss. It is part of the new facts which they having read can now discuss with ease with their minister, because it is something that he has given them to read.

Q. Is it important to discuss adultery with ease? [225] A. Yes, it is very important. I think it is one of the marks of an emotional maturity in a married couple with the person who intimately related with them as counselor and with each other discuss sexual matters with a great deal of ease and create to each other and to their children a sense of joy in proper sexuality.

Mr. Creamer: No further questions.

Mr. Dickstein: No further questions.

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By the Court:

Q. Reverend, you have read this book many times? A. Yes, I have.

Q. Would you think it is the kind of book that you would like to have in the library of your home if you have a fourteen-, or fifteen-, or sixteen-year-old son or daughter?

A. It is in the library of my home. My wife reads it. The teenage children in my parish read it because they know that they can freely discuss it and what it represents with me. It is part of my attempt with them to teach them that sex is not nasty. That one may read things which advocate a morality we do not agree with and not be perverted thereby.

Q. Some of the things in here relate to matters of sex perversion, do they not, or in your opinion they do not?

A. I think generally the kind of relationships the author describes are not commonly held by psychologists as perversions.

[226] Q. By psychologists? A. Yes. I would say most, even, pastors, counseling books suggest that exploration in sex is legitimate and valuable, and is not to be invested with a sense of immorality. There is certainly no direction, the teaching of the Church specifically, about this kind of relationship in a marriage as long as it is not exploited, as long as there is no shame on the part of one partner or another, but whether or not that is true, this is part of these children's lives, the material that is freely available to them is the hard-core pornography, shamefully discussing lewd, prurient kinds of garbage which is sold under the counter to these children, is frequently and freely available, and their whole understanding of sex is one of exploration of the girl on the one hand—and the girl has practically no knowledge of what is going on. This is particularly true in the lower classes, but even in the middle classes there is a frequent ignorance on the part of young

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girls about sexuality, and their only alternative, if we did not treat sex freely and frankly would be to go to the pornography or trash, or to books which they can not understand and are withheld from them in most cases. This kind of book in the setting of a person they trust and respect who has said, "Read it. We will discuss it," will form the relationship of a new kind of understanding. When a child comes to you and says, "Reverend, what is a virgin? I [227] don't understand the virgin birth," you begin to get an understanding that you must teach children and adults a whole kind of information. I, of course, work with a large number of people who simply do not know the source of pregnancy and their only sexual information is entirely pornographic. If I am to work effectively with them I must have means to read, of talk, or give them to read that with ease they can talk about things they do know about in a distorted way, and then we can talk about what is the kind of relationship you should have and I should have, and the proper kind of relationship.

Q. Do you think this book sets forth the proper kind of relationships? A. No, I don't think it advocates a relationship that any Christian minister or Christian church advocates.

Q. Do you think it is the kind of thing that someone should read and then be told that certain portions are not the kind of things religion says you should do? A. They can always read, and I have had them ask me to explain why God kills a man because he refuses to cohabit with his sister-in-law.

Q. How about the person who reads the book and doesn't have the reverend to go to talk to him about it and believes this is a code of morals that should be followed as set forth in this book? [228] A. This is one of the difficulties to me of pornography.

Q. I know it is a difficulty, but I want to pin you down and ask you whether or not a person who reads this book,

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of fourteen or sixteen or eighteen, and sees extracurricular sexual activities with a person before marriage, or after marriage, after marriage not with his own spouse, and the book would give a stamp of approval because as a result of those sexual activities they obtain sexual happiness? A. I don't think any person, particularly a teenager, is going to read this book and be convinced that adultery is a proper way of life. It is not a book of advocacy in that sense.

Q. Were you here this morning when I asked the doctor from the University of Pennsylvania with regard to a certain section? A. Yes, I was.

Q. I read to him the sexual experiences with a person other than the husband of the wife, and she gained great sexual satisfaction. A. Yes.

Q. From what had happened. A. Yes. This is part and parcel of their whole culture and upbringing, and everything that surrounds them.

Q. In other words— A. No, this book is in the framework of a whole history of [229] a very unhappy development, a whole history of frustrations.

Q. And then in order to become happy you break the moral code, break the penal laws to become happy sexually, and if somebody happens to see you you are arrested for sodomy and brought to the courts and perhaps convicted? A. Again, your Honor, I have to insist that these kids are always talking about such things.

Q. Not only the kids. A. Or adults.

Q. This happens to be prefaced, I believe, by the age of thirty-six. Here is a female at age thirty-six sexually unhappy. She is frustrated. She goes around with someone not her husband and he is unhappy, too. So, they gain sexual happiness by breaking a moral code. Don't you think it is taking a— A. It certainly even in the relationship with this Dr. So-And-So is not any real satisfaction of a lasting nature. She can not establish any kind of basic

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and permanent strength with him. He is not in the relationship of a protector for her or her children. She has a whole set of values which preclude her even asking for help.

Q. Isn't it a fact that she has no moral code at all? A. No. She has a moral code. It is not one with which we agree.

[230] Q. It is a non-moral code, then, isn't it? A. No. It is its own kind of moral code. She refuses, for instance, to ask this doctor for money which is part of her own moral code.

Q. I am talking about sex only, not money, or dollars, talking about she is unhappy with her husband. He is unhappy with his wife. So, in order to become happy sexually they have intercourse in whatever way it says in the book? A. She demonstrates she does not find happiness, or confidence, or security, or any other thing that our people want to have, and underwrites if these are valueless you are quite likely going to be in the kind of financial mess I am in, and the continual chaos my household is in. The main impact of that is this kind of person may indeed find a sexual happiness, but the sexual happiness is not total. She can not even have the person when she wants him every time, not even completely sexual happiness.

Q. She can't have him when she wants, so ultimately it is the natural thing that she will try to divorce her husband and eventually try to find a new one, wouldn't that follow? A. It doesn't there.

Q. I don't know whether it does, but isn't that the natural sequence of events? A. Certainly the common sequence of events.

[231] Q. And wouldn't it follow that the ultimate would be that, I want a divorce from my husband, or my wife, because I am unhappy sexually and I hope the next experience is going to bring more sexual happiness, and if it doesn't, I can go on another escapade with someone

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else? Isn't that a breakdown of all the morals of the church? A. I don't think this is the impact of the book. I don't think this is what the author represents. This sexual happiness she gets with two people, I believe, does not lead to further relationships. The first she can not even live in the same city. Most young people in reading this are very disturbed that there is a kind of intimacy and involvement here, but it doesn't lead to anything else and they see the falsity of putting this one value above all others.

Q. If you read this book, I haven't read it. It is one of the many things that have come before me. I read sections of it. If you read the book wouldn't it lead to the conclusion if you were a thinking youngster that you better not get married because you will never be happy sexually until you try, if you are a girl, all the men that you know, and if you are a boy, all the girls that you know? A. No, because this book is read, first of all, in the context of our popular culture, in the context of what kids and adults are saying to each other.

[232] Q. But how do you know that? A. Because these children and adults are raised in a certain kind of culture and this culture insists upon many kinds of values and indeed the great popular idols of our time are the movie queens and so forth who are representations that you can have financial plenty and respectability and so forth and so on without any regard for any kind of morality whatsoever, business, moral, ethical or whatever, to speak of. They are measuring things against this. This kind of book is a very helpful purgative taken against the movie-queen symbol of our society.

Q. When you hand this book out to a parishioner who has your counsel you hand it out with a stamp of approval that that is the course of conduct you approve? A. I hand it out in the context of who I am, my way of life, my means of profession, my message I deliver at least once a week,

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if not more often, and of the kind of values I try to exemplify in my life. The boys and girls with which I work, the adults with which I work, particularly, in a culture that uses a great deal of what is commonly known as obscenity in four-letter words. They know I do not get excited about this. I ignore it, and as a result, the kids do not have a need to continue saying it in my presence. They know because I accept this I do not go out and change the matters of my life. They [233] can see the way my wife and I live among them. They can also see that because my wife and I have no prurient shamefulness about sexuality that it is an area that is solid, can be the means of facing one corner of marriage and can be the means of exploring the many, many problems that they have. All our children in our society grow up in a world where there is a fantastic divorce rate and increasing rate of illegitimate birth and promiscuity among youngsters with no sexual enjoyment or otherwise. It is simply there. They don't know enough to enjoy it. They are so full of shame.

Q. You think they are full of shame or just sorry when something else happens? A. I think they are full of shame.

Q. In other words, they commit the sexual act and they are full of shame after they get home? A. They commit the sexual act in shame itself, shamefully.

Q. You mean mentally, thinking that when they commit the act— A. Surely.

Q. —or do they only think about it being shameful when, let us say, a fifteen-year-old girl and a sixteen-year-old boy in high school only think it is shameful when somebody calls their attention to it? A. No, I don't believe that. I think the sense of shame is [234] very general in our culture, and the very sense of shame drives people into immoral behavior.

Q. If it is shameful and then it would continue on once a week with the same girl, or twice a week, or four times a

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week, and that shameful conduct, it doesn't hit the conscience of the individual? A. Your Honor, we know married women who are quite adanced in their marriage—

Q. I am talking about children, not about married women. I am talking about the shamefulness of these children that come to see you. You say they feel a sense of shame when this happens. A. Yes, surely. Now, take for instance—

Q. And it continues on. They feel a sense of shame and still continue on, and on, and on until the girl becomes pregnant, and then what? A. Which is usually very quickly, unfortunately.

Q. I don't know. A. It is. Let me give you a specific example. In Fort Pierce, Florida, we developed the Child Care Center, dealing with people whose cultural level knew very little about sexuality, only that it was bad. In a population of 12,000 we had 1,200 illegitimate births, or 1,200 unwed mothers under the age of twenty-one. Most of the girls who had become unwed mothers [235] were from strongly Christian homes. This was very upsetting to my colleagues, and we wanted to find out why.

Q. It should be, not only upsetting to your colleagues, but upsetting to everybody. A. But if you feel your whole life's work is being perverted because of your own failure, we found, number one, these girls did not know what adultery or fornication meant. That was supposed to be sinful.

Number two, we found they had been trained that they could not say no to the demands of the man because of the value their subculture creates. No one ever worked among this group of people and explored generally. Now, we find it is possible to change this, but because of the intense prudery of this small group and because of the fact that the mothers were quite often away at religious exercises rather than dealing with their family we actually had the rather hilarious scene of ministers going around encouraging mothers not to go to church so frequently. These chil-

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dren must be given real information, information that they can understand if they are to avoid the pitfalls of the life that surrounds them. These children were so completely innocent—

Q. Of intent? A. —that they did not know what it was that was sinful.

Q. I don't understand you. [236] A. They did not know what copulation was. They did not know what fornication, adultery was in specific, clear-cut terms. This is an extremely impoverished segment of our culture, but it is not as small as it might seem. It is extensive throughout the United States, as much as one-fifth of our population.

Q. We have—and you know we have—young girls, young men in college, seniors in high school. Would you say they do not know what copulation was? A. This is a different type. Although it is frequent in my experience that boys and girls in high school, particularly the girls, do not really know what is involved. They know enough—

Q. Now, wait a minute. You mean they don't know what is involved in the way of responsibility? A. They do not know—for instance, quite frequently a young girl comes after one of the high school courses in effective living and family counseling and will say, "I understand how the sperm gets to the egg, and so forth and so on, but I don't know how it gets there in the first place." They don't know the actual action of sexuality. It is my feeling this should be taught in the family, not in classrooms, but the family are unprepared to teach it.

Q. Why should sexuality be taught to a twelve-year-old girl or boy who hopes to be married sometime when they are eighteen or nineteen? In other words, the pleasures of sex and how to [237] have sexual relations in order to get the most out of it? Why should not the facts be taught and not beyond that? A. I think these things should be the background against which they are brought up, not diagrams on the wall or recorded demon-

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strations, or things of this sort, but parents should freely and casually speak before the children and it is a traumatic experience in our culture. We don't know how to deal with it with our children. So, we have to take some special effort to teach them. Then in terms of particularly a large urban segment we have to tell our children certain things to protect themselves, because there are overly mature, only in a very narrow sense, boys and girls who will prey on the innocent. We have many cases of adolescents who come in in psychic shock because they have been exploited by their more enlightened and depraved cohorts. It is necessary for them to have a sense of awareness about what is going on so they may protect themselves and make some real moral choices.

Q. Talking about protection, are you talking about that the girl should carry a contraceptive in her pocketbook?

A. No. The kinds of things that are involved in sexuality show she can make her own present moral decision. If we ignore that we can't make a free choice. If we are well informed, we can.

Q. If she makes a moral choice at age of thirteen to have [238] sexual relations and knows all about it, it is all right? A. No. I am saying they didn't have the choice that might be made because it is necessary to prepare them, because in my counseling experience there are far too many girls at thirteen having their first child. If they had had more information they not only would have been able to have contraceptives, but not even engaged in the sexual relationship itself. They did so out of ignorance, and they did so because we moral leaders and authorities have failed in our job of communicating to them in terms they can understand, and it is our responsibility.

Q. So, you think the circulation of this book in all ages down to a certain age whatever, you didn't mention, it would be worthwhile among men and women, girls and

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boys? A. I think like all other books, your Honor, including the Bible, we use our good sense.

Q. I am only talking about this book, not the Bible or any other. A. I am saying this book is like all other books. I use my good sense about it. In the first place, it is not attracted to an eleven-year-old. I doubt if they would want to read it at all. In the second place, I try to place all of my work in a certain framework and direction.

Q. I am not talking about you. I am talking about someone else as the book is on the stands, the mails, or whatever it [239] is. Not what you do. A. Yes.

Q. Do you think that wide circulation of this book would be perfectly all right? A. I think it would serve as a ventilation from the kind of horrible trash that is freely available, the books which are on any newsstand which show sodomy, lesbianism, homosexuality, and adultery freely practiced.

Q. Isn't it in this book? A. But dealt with in an unshameful way, a dry way, a straight-forward way.

[240] Q. That's a question for me. In your opinion it is unshameful? A. In my opinion and in my experience of using this book widely among quite average American women and men, that this is the impact of this book, that it has a ventilating and health-giving effect, that it does not create a sense of deepness or overt sexual desire and certainly does not create the sense of shame, but to ventilate the shame realistically and tends to do away with some of the glitter that we have in our society associated with sex and all of its trappings. It is my feeling, your Honor—

Q. You think that this book was written by the author with a sense of shame? A. With a sense of shame?

Q. Yes. A. No, I don't.

Q. It was the experiences of the author or whatever it was? A. That's what it is represented as, yes.

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Q. And regardless of the experiences in here, you say part of it is to teach the reader that some of these things, as a result of doing them, they should have a sense of shame. That's what I don't understand. [241] A. No, I don't think that.

Q. That's why I don't understand your story. A. When I use the term "sense of shame," I am not talking about the theological guilt.

Q. You are not talking about a sin? A. I am not—when I talk about the sense of shame, I am talking about a pathological or a neurotic condition.

Q. You are talking about a sense of shame, of being remorseful? A. No, I am talking about it as a morbid fascination coupled with a morbid and unhealthy sense of guilt which is not related to the reality of the situation which is a wallowing in guiltiness, which is a form of sexual perversion in itself.

Now, this is what I mean when I talk about a sense of shame. Now, this book in its very dry and straightforward way does not sell sex in the way that almost everything that surrounds our people and our culture does, and I think it has to be seen in that context that freely available to them are the pulp magazines with the lurid covers and lurid insides, are the hard core pornography, the comic books and the one or two-page letters dealing directly with filth and perversion and violence and deep shamefulfulness and [242] disgust, and these are immediately and freely circulated throughout our society, and then, added on to that, the girly magazines, the moving picture shows and the rest of the expressions of mass culture, that we are a culture that packages and processes and sells sex in a perverted form, and that one of the real values of this book is that it cuts sex down to its size which is not really a glorious, ecstatic thing that is the end and goal of all lives, but it is simply one of the things that can be solid and enjoyed and can be one of the bases of a

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sound life and it casts itself in a proper perspective because of its very simplicity and its very recounting over and over again of these terrible frustrating and unenjoyable experiences and this terrible inability with sexual pleasure and sexual enjoyment to reach a full and solid and satisfying life, and this in contrast to the movie goddesses is a very wholesome and very moral and almost puritanical thing. I think it has to be seen in that context.

Q. You mean it has to be; if it isn't seen in that context, then what? A. Well, this is the way I see it and the way I use it: I work with children whose common expression is a four-letter perversion. This is their form of greeting and this is common and extending in our culture. I work with adults [243] whose common form of recreation is the telling of dirty and sometimes obscene and pornographic stories.

Now, these people may be rejected, out of hand, and say they are too guilty to regenerate or we may look and deal and say, "Here is where they are. This is the filth they have been taught about sex. Let us now try to do a cleansing job," and the cleansing job cannot simply be done with platitudes but must be done by getting in and walking and working in the world, not accepting it, but taking it as it is and living by your own standards and teaching your own message, and I think this is what we are trying to do, the people who use this kind of book and who recognize its real value and it does have a tremendous value in this kind of counseling.

Q. If you take the book as a whole, it approves of adultery, does it not? A. That's the author who approves of adultery. I think the impact of the book is to teach that the simple search for sexual satisfaction does not lead to other satisfactions.

Q. Doesn't lead to other satisfactions? A. It does not lead to a stable life at all. It does not lead to financial

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security. It does not lead to the kind of relationship that our people are looking for in marriage. That is, the sense of intimacy, the sense of [244] poetry, the sense of lyricism, the sense of strength and security that a marriage gives and is intensified by sex. We have only the intensification without anything to intensify, and this is clear to people who read this book as they go through it. It completely relieves their sense, though, of their fantasies, and this is very important, too, because their fantasies are couched against the kind of world in which they live and which you can walk down the streets in the town in which I live and within a block you could purchase three or four hundred different books that you would not permit in your house, and I don't permit in mine, but they are freely available to our children when they come into our sports center, when they come into our remedial reading centers, when they come into our various other kinds of programs. They have these in their hip pockets. They are talking about them. They are carried around, the women in the black lingerie, and they have drawn large sexual organs on them and have written some pornographic statements underneath and are talking about them in this way.

Now, we can go and shout and scream at them and tell them they are wrong, and all we do is alienate them. We can come and sit down and say, look, this thing [245] is valuable, this thing is natural, this thing is one of the best things in life, but it is only one part of life, and it is not really the glorious thing you think it is, but it is not dirty and vile and filthy, and it is certainly not the basis, certainly should not be the basis, of the kind of vicious exploitation that we have among our youngsters, and the very viciousness need not be a physical kind of violence but is a thing our little girls are taught where they are taught to be courtesans, to paint themselves attractively, and the newspapers are filled with columns which, if they were entitled appropriately, would say, "How to look like

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a successful prostitute.” This is exactly what they should be titled, and our whole intent is to exploit the male and, conversely, the boys are taught all their ways to impress and so on with girls, and the very sexual manuals, for instance, there is one, what to tell your child about sex by the Child Study Association, refuses to take a stand on the situations and is simply ambiguous: In some towns this is all right, and in some towns, that is all right, and talks generally about petting and necking that from one location to another have different meanings, and give no guidance at all, and yet right in the middle of the supposedly guides for morality is a whole guide on [246] how to be attractive, how to be popular and essentially how to be attractive and how to be popular is how to have sexual lure.

Now, this is what we teach our children, and I think we need to respond to this, not simply with moral judgment but with a realistic understanding of what the real value of sex is and with a complete ability to talk to these people in their own terms and to allow the free circulation of literature that talks about sex without shame and that describes many kinds of sexual experiences and their natural consequences. Out of that kind of freedom I am convinced that it is my experience with families that families will come to a moral choice that is much more superior than I can give them through preaching.

Q. You think that this book lends to the situation that a female should do whatever she thinks is necessary to give the male the greatest sexual happiness as a result of having relations with her and also at the same time that he should do the same for the female regardless of what method of sexual relations is used? A. I think it is generally accepted among both pastoral counselors and psychologists—I know this; I don’t think it—

Q. I am talking about you, what you think. A. Well, I am just putting this in a framework, that [247] between married couples, as long as it is done with delicacy, with

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concern for the feelings of one another, that there is nothing that should be condemned in terms of a sexual relationship so long as the integrity of one another is recognized.

Q. And in the form in this book, the sexual form as set forth in this book that you have read? A. They are—I don't think that there is—no, I am certain that there is not a sexual form in this book that is regarded as perverse by the general profession so long as—

Q. I am talking about you. A. As long as there is integrity.

Q. I am talking about you. A. No, so long as it was in the proper framework.

Q. And as set forth in this book? A. This is the natural and proper evolution of the relationship between two human beings. Now, as I said before, I think the evolution of this is an intimate and private thing and that we can prepare our families to give this kind of training by giving them a general sense of ventilation and ease about discussing sex and discussing sex and being open about talking about sex.

As I said, the church does not mean—as [248] the implication counsel seemed to think—that one is open and loose in one's morals, but simply that one talks as our ancestors did.

Now, we couldn't read Luther in most open meetings because his language was quite scatological.

Most of my grandparents who were all Baptist preachers have left memoirs and diaries which are full of very direct comments about the kind of counseling they gave in this regard when they were country preachers directly related to their people. They knew they could not talk in high-flown terms, so they talked very directly and very easily to their people.

Q. I ask you again, do you give your stamp of approval on the methods of sexual relationships set forth in this

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book, and the question can be answered yes or no. A. I couldn't phrase it that way, your Honor.

Q. Why can't you? A. I would have to say within the—in the way that I did—within married couples.

Q. Yes? A. All right.

Q. I am talking about between married couples, limited to married couples. [249] A. All right. So long as the integrity of one another is respected and so long as it is a natural and easy development of a loving couple, then I don't recall anything described in the book which I regard or which is generally regarded as perverse.

Q. I am talking about you, whether you— A. I said I regard or as is generally regarded as perverse.

Q. I am not speaking about the particular situation I read here this morning where the relationship was between a male and female. A. You are speaking about what is legally defined as sodomy?

Q. Unmarried. But if the relationship had been between husband and wife. A. Yes.

Q. Married. It would have received your stamp of approval as proper? A. I don't put stamps of approval on what people's private behavior—

Q. What words would you want to use? A. No, I would say again that the intimate relationships of a loving couple in marriage, so long as they have developed naturally and with regard for the integrity of one another, [250] that there is no such thing as perversion.

Q. Now, will you read what I read this morning, what I asked the doctor to read? Read the first four paragraphs on page 207, sir.

Now, then, I have asked you a question with regard to that. A. I repeat—

Q. The relationship that is there. A. I repeat, this was not described—so long as it is in the boundaries that I have stated—this does not describe a perversion and it describes a kind of sexual relationship which is generally regarded

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as quite permissible and proper so long as it is within the right framework.

Q. And you so regard it individually? A. That's right, but so long as it is within that kind of framework, nor do I think it is the kind of thing that can be directively done by counseling, something that a counselor can indicate is possible.

The Court: Any questions, gentlemen?

Do you have anything else you want to say, Reverend?

Mr. Dickstein: No further questions.

Mr. Creamer: I have one or two questions, your Honor.

[251] *Cross-examination by Mr. Creamer:*

Q. Do I understand you to say the author in expressing what happened to her, these various sexual episodes, did not enjoy what was going on? A. I would say the main impact of the book is that most of her experiences are unsatisfactory and unenjoyable and this is the main feeling that most people get out of it.

Q. Unenjoyable physically? A. Pardon?

Q. Unenjoyable physically? A. Yes, except for two individuals.

Q. I beg your pardon? A. Except for relationships with two individuals.

Q. Well, then, let me ask you this: From your reading of the book, from the description of the various acts of sexual intercourse and other sexual acts, was she physically enjoying them at the time? Were the partners physically enjoying them at the time from a fair reading of the book? A. She seemed to get physical enjoyment from two men in the book.

Q. She just seemed to? A. This is what she expressed.

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Q. And which two men were they? [252] A. It was the doctor and the—I don't recall the other name, but it was—

The Court: Do you want to have the book?

A. It was a younger man. I am not even sure—

By Mr. Creamer:

Q. I would like to have his name if you could recall it.
A. I will look it up for you.

Q. Thank you. A. I believe it is Bill Sanford in the book.

Q. Well, how about Bill Iverson? A. Pardon?

Q. Bill Iverson, directing your attention to page 167, the last paragraph on the top of page 168, to the three dots. Do you get the impression she enjoyed that with Bill Iverson? A. Yes, I do.

Q. And directing your attention to page 171, the last paragraph and the first paragraph on page 172, did she enjoy that episode with Bill Iverson?

The Court: With whom?

Mr. Creamer: Bill Iverson.

Mr. Dickstein: The same name.

A. Yes, she does.

By Mr. Creamer:

Q. And how about her sexual relations with her first [253] husband before she married him, did she indicate any satisfaction with them? A. I think you are perhaps misunderstanding. What I am saying is that I am talking about a totally satisfactory relationship. She obviously didn't with her first husband or she would not have left him.

Q. Well, these portrayals of sex, these sexual acts in here, are not portrayed as if they are unenjoyable in them-

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selves, are they? You are not suggesting that? A. I have not suggested that at all. I have said again and again that there is a great expression here of the techniques and means of reaching sexual satisfaction and that this is the main import and purpose of the author, it seems to me, is in her own philosophy. However, what I am talking about it, first of all, a deep and lasting even sexual satisfaction she does not seem to have developed and, more importantly, what I am talking about is the depth of a totally satisfying relationship with the man. This is not described.

Q. It isn't described with Dr. Adler? A. No, it isn't. In fact, I think it is the most important impact in reading this has on people. The average person who reads this is aware of the failure of this relationship to move beyond anything other than a purely and simply [254] sexual relationship, even though it is a friendly and nice and intimate relationship. It does not spread itself to form any kind of base for either of their lives. In fact, both of them have serious kinds of protections which they establish for themselves. The impact of this on the average person who reads it is to be aware that there are definite limitations and definite dangers to the moral philosophy espoused by the author and the impact while it is to quite simply and easily discuss these things is certainly not to sell, in a way that sex is sold all around us, the enjoyment of sex is the key to all other satisfactions.

I must insist again that this book must be seen within the framework of what our people and youngsters are taught daily, that sex itself is the key, that glamour itself is the key. They are seduced time and again and again by this philosophy, by almost every public expression of culture that surrounds them, that sex and glamour is the key.

Q. And the fact that she describes episode after episode of getting enjoyment out of it without responsibility

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you feel is of no moment to the significance of this book?
A. Certainly it is of no moment.

[255] Q. Because you read in something that isn't written, but something that you infer, that her relationships were not happy? A. It is implicitly written into the book. It is very clear what her philosophy is and what she wants out of a relationship with a man, and this is one of the values of the book. It is clear.

Q. I think it is clear, too. A. I think it is clear—

The Court: You may answer the question.

A. I say it is clear that she is not seeking anything more with another person and it is very clear also that she does not regard sex as the key to other kinds of pleasures, other kinds of satisfactions and other kinds of responsibilities, and it is quite implicitly clear in the book that when you do not take certain kinds of responsibilities in a sexual embrace, that you have severe limitations in your relationship with that person subsequently.

Now, the author thinks that this is good. The average person in our society does not think that this is good, is looking for a different kind of guidance and reads this exactly for what it is, an easy, straightforward account of sexual experiences, a recounting of the terrible [256] frustrations of a woman moving toward some kind of solution of her problems, and gets generally a ventilation of these feelings and explicitly learns the philosophy that I was saying—explicitly; I am not inferring. This is my experience from giving this book to numbers of people, that what they learned from it is that sexual satisfaction in and of itself may be quite good, in and of itself, but that that philosophy has severe restrictions, and that if you are going to get other kinds of enjoyment you must also take responsibility for the sexual embrace.

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Mr. Creamer: No further questions.

Mr. Dickstein: No questions.

Mr. Dickstein: The defense rests.

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[257] Mr. Creamer: In rebuttal, your Honor, the Government calls Dr. Frignito.

GOVERNMENT'S REBUTTAL EVIDENCE

DR. NICHOLAS GEORGE FRIGNITO, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Creamer:

Q. Dr. Frignito— A. I have permission to stand.

Q. Very good. A. Thank you.

Q. Dr. Frignito, what is your educational background?

A. I am a physician graduated from the Hahnemann Medical College and Hospital in 1938. Licensed to practice medicine in the State of Pennsylvania as of 1939, and I specialized in the field of neurology and psychiatry, certified by the Board, the American Board of Neurology and Psychology in 1945.

Q. And would you give us a little of your general background; since you graduated from medical school what you have been doing? A. Following my regular internship I was a resident and a fellow in psychiatry and neurology at the Philadelphia State [258] Hospital which qualified me to be a specialist in my field. Since that time I have been in the practice of psychiatry and neurology, and have been teaching at the Hahnemann Medical College, and presently

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hold the title of associate professor of neurology. I am the visiting chief psychiatrist at the Philadelphia General Hospital since 1946. I am a consultant in neurology to the Veterans' Administration Hospital, and I am a medical director and chief psychiatrist of the County Court of Philadelphia.

Q. How long have you been chief psychiatrist of the County Court of Philadelphia? A. Since 1955, but I have been with the court since 1947 as an examining psychiatrist and neurologist.

Q. And what have some of your duties been with regard to the County Court? A. I am fully responsible to the judiciary for the psychological, psychiatric and medical examinations of all juveniles who come to our attention at court. I am also responsible for the conduct of examinations for men and women who come to the attention of our court. The medical department of which I am director performs on the average each year approximately 6,000 psychiatric and psychological examinations, and approximately 8,000 physical examinations on all these individuals.

Q. Thank you, Doctor.

[259] Have you read "The Housewife's Handbook of Selective Promiscuity" by Rey Anthony?

Mr. Dickstein: Objection, your Honor. If the purpose of the doctor's testimony is to introduce substantive evidence tending to prove the obscenity of any of the works in question it had to be produced in the Government's case in chief. If it is to go into the issue of credibility of our witnesses, and that issue alone, we have no objection to its admissibility and this line of questioning would be appropriate only if limited to that purpose and that purpose alone.

Mr. Creamer: Your Honor, this will be a rebuttal witness. I just asked him if he read the

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book. I don't see anything that goes beyond rebuttal there.

The Court: No, but I assume your objection, sir, was to the whole general questions that you thought were to follow. I do not know what is to follow, and if that is to follow, we might as well rule on it now.

Mr. Dickstein: That's correct, your Honor, as we perceive what the Government is now trying to do. It waited until it saw what kind of a case we were going to put on before it even attempted to make any proof with regard to obscenity except for the works itself upon which it rested and the two postmasters from the cities in Pennsylvania.

Mr. Creamer: Your Honor, I think this is premature. [260] I think as my questioning develops it is the appropriate time to take it up. This is a rebuttal witness.

The Court: We will see what develops and give counsel an opportunity to object.

Don't answer the question if I tell you not to answer.

By Mr. Creamer:

Q. Have you read "The Housewife's Handbook," Doctor? A. No response.

The Court: I won't stop you unless you are told.

The Witness: Yes, sir, I have.

By Mr. Creamer:

Q. Do you think it has any medical value? A. No, I do not.

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Q. Why? A. I think it is essentially an obscene book and it is presented under the guise of medical—

Mr. Dickstein: Objection. He has not been qualified to speak to all of the factors which relate to the ultimate judgment of obscenity which only your Honor can make. He is speaking as a psychiatric expert, which he has been qualified for, with respect to those elements and the totality of obscenity which go to his specialty.

[261] Mr. Creamer: We have had a totality of witnesses for the defense who said it wasn't obscene, couldn't be obscene, and this doctor has reviewed the book and he is about to give his conceptions based on his knowledge and experience in psychiatry, and we are merely rebutting what the defense put up about this book.

Mr. Dickstein: Your Honor, I would say this: No witness of ours said that the book was or was not obscene. Our psychiatric witnesses testified as to the elements of pruriency, the effect of pruriency, the nature of pruriency upon the human psyche within normal limits, and on the pathological fringes. Our literary expert, Mr. Macdonald, testified as to whether the book goes substantially beyond the customary limits of candor that society now tolerates in other material. The Reverend von Hilsheimer testified as to the religious views on the subject of sex generally, and nobody has dared to take this issue away from your Honor as the Government appears to be suggesting that Dr. Frignito now do.

The Court: I reserve the right to determine whether it is that. That is my function here.

Mr. Creamer: If your Honor please, I move that we strike the testimony about it being obscene, and I just ask the doctor for his conclusions without

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getting into the question of obscenity. I move that be stricken.

[262] The Court: It may be stricken.

Mr. Dickstein: What is the question now before us?

The Court: I don't know.

Mr. Creamer: I would like the doctor's observations without getting into a question of whether or not in his opinion the book is obscene as to the medical value, or what he feels—whether it has any significant medical value to it.

The Witness: In my opinion it has no medical value.

By Mr. Creamer:

Q. Why? A. Because it gives a distorted viewpoint on sexual behavior of women, and the type of behavior that is called, say, prevalent in our community.

Q. Would it have any sanguine effect in psychiatry in any way? A. If I understand your question, you mean detrimental?

Q. Does it have any beneficial effect in psychiatry; is it of any value psychiatrically? A. No. In fact, I think it is a menace. It is a dangerous book. I think it is a very misleading book, and can lead to a lot of chaotic situations, because my interpretation of the [263] book, it fosters promiscuity. It fosters sexual perversity. It recommends, practically—I don't say "recommends," but implies that adultery is all right and fornication is all right, and all types of sexual perversions are all right. So, I interpret this book as being very vicious and very dangerous.

Q. Would this book have any value to you as a practicing psychiatrist in treating patients? A. I would never use a book like this, because I think a book like this would upset

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any person, whether that person is being treated by a psychiatrist or not being treated. I think it is very dangerous to the majority of people in the community. I don't think it would be a threat to, say, a professional person who has training and knowledge in this sort of business, but I think for the majority of our people and particularly the adolescent boy and girl it certainly is a very dangerous thing.

Mr. Dickstein: Objection to the portion of the testimony which goes to the effect of the book upon an adolescent child. That is not the federal test, Your Honor.

The Court: It is his opinion. Whether or not it is the test is entirely up to me.

Mr. Dickstein: All right.

By Mr. Creamer:

Q. Have you had experience with adolescents in your practice? A. Yes. We examine quite a number in our court, and over the [264] years I have examined many thousands of cases of boys and girls who come to our court. My experience has been with this type of book and of course similar books—

Mr. Dickstein: I object to the characterization of a book as "this type of book" unless the doctor indicates what other material he is referring to which has been read by adolescents under his care.

Mr. Creamer: He said books of a similar nature.

The Court: If he talks about this book—

Are you talking about this particular book, "The Housewife's Handbook of Sexual Promiscuity"?

The Witness: I would say I know of no adolescent that read this book, but I would say that the material contained in this book would be dangerous

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for an adolescent boy. In my experience in court, what this type of book results in causes delinquency.

Mr. Dickstein: Objection.

The Court: Overruled.

The Witness: It encourages all types of sex behavior, say, masturbation. It increases sexual promiscuity, and it has contributed to the increase in illegitimacy among our adolescent boys and girls so that now we are seeing girls thirteen and fourteen in our courts who have become pregnant because of illicit sexual relations, and it has—the incidence [265] of homosexuality has increased considerably, particularly in the last ten years. In fact, there has been an increase in sex offenses in the last ten years, 50 percent in some cases, and as high as 80 percent, as a result.

Mr. Dickstein: Your Honor, I would like to say at this point that we have—I would like it understood at this point that we have a continuing objection to any testimony which has now been offered or will be offered with respect to the effect of this material in terms of acting out. This is a question which the Supreme Court has put beyond the pale of obscenity inquiries. I would also like to state it is becoming increasingly apparent that the purpose of proving the testimony of this witness is to try to develop a case of obscenity which the Government failed to do before they closed their presentation.

Mr. Creamer: Your Honor, Dr. Bennett and the Reverend von Hilsheimer testified as to what could happen when this book got into the hands of a fourteen-year-old. We are merely rebutting the testimony that they gave on that point.

The Court: You may do that, but I think that the doctor went a little beyond that in the last two answers, and I do not think it would be proper.

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Mr. Creamer: I would move to strike them voluntarily.

[266] The Court: He is talking about statistics, and so forth, and it can not be a result of this book or any other. It is a result of any number of situations. If he describes that as a general situation which most of us know, anyway, but would not be in this record, it would be one thing, but I don't think he said as a result of reading this book we had an increase of this or that and several sexual offenses. I think it would be better if you ask the doctor the question and have him answer, give counsel an opportunity to object rather than have the doctor repeat—recite the wrong words.

By Mr. Creamer:

Q. From your education and experience, Doctor, what would be the effect of a fourteen-year-old boy reading the handbook?

Mr. Dickstein: Objection.

The Court: Overruled.

The Witness: To an average boy, I would say it would be very disturbing and certainly would possibly, and most likely, excite him to sexual misconduct.

By Mr. Creamer:

Q. What kind of sexual misconduct?

Mr. Dickstein: Do I have a continuing objection to this entire line? I don't want to interrupt.

The Court: No. This follows along the same thing, but if we change the subject I want the objection, if [267] you want to have an objection.

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Mr. Dickstein: I object.

The Court: Objection overruled.

You may answer, Doctor.

The Witness: Because of the sexual image it would produce in the boy it would lead to self-abuse, masturbation and that would lead to other types of sexual activity.

By Mr. Creamer:

Q. Doctor, from your experience and education, what do you believe the impact would be on an average person, an adult? A. I think again that it would stimulate the prurient interest and certainly also would mislead him into believing that this is acceptable behavior in our community.

Mr. Dickstein: Objection, Your Honor, unless he defines what he means by "prurient interest."

The Witness: That all types of perverted activities are normal as described in this book.

Mr. Dickstein: Has the doctor just described his definition of "prurient"?

The Witness: In other words, the stimulation by writing or pornographic books to sexual misconduct, or instilling lustful feelings.

Mr. Creamer: No further questions, Your Honor.

[268] *Cross-examination by Mr. Dickstein:*

Q. Doctor, did I hear you say that "The Housewife's Handbook" does describe a type of attitude which is prevalent in our society? A. No. It implies that this type of activity that this person indulged in is the type that most women desire and want, and that would be perfectly normal for women to do.

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Q. Doctor, when you read "The Housewife's Handbook"—incidentally, when did you read it? A. About two months ago or so.

Q. About two months ago? A. Yes.

Q. Do you happen to know anybody else who has read it other than those who are in the court here today? A. My secretary. A mature lady of sixty, I add.

Q. And that is the only person you know who has read the book? A. No. One of my psychologists, Dr. Orchinik.

Q. When you read the book did you get the impression that the authoress was a happy woman? A. No. The only impression I got was that she was a sick woman. I got the impression that she certainly was quite confused about her sex life and that she had, well, I guess she [269] was abnormal, poor moral standards.

Q. Is morality a concept of psychiatry or religion? A. I would think so. I certainly don't recommend people to be promiscuous or practice perversity.

Q. That wasn't my question. I asked you whether morality is a concept of psychiatry or religion. A. I think all human activity, no matter what it might be, comes under the aegis of a psychiatrist in advising patients what to do and what not to do.

Q. Do you consider you are an expert on morality? A. Oh, no. Of course not. I do not.

Q. By the way, when you read the book did you read it from cover to cover, Doctor? A. Yes, sir; I did.

Q. All of it? A. Yes, sir.

Q. Did you read the authoress's discussion on "Sex in Language and Action"? A. I read every word. I can't remember the details. I read every word of the book.

Q. Do you remember what she had to say about sex in language and action? A. I think, as I recall, she deplored the fact that so many of our young people don't know the proper names for sex organs [270] or sex activity, and encouraged the use of the vernacular.

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Q. Do you consider that wrong? A. Yes, I do. I don't think vulgarism is proper in our society.

Q. You would not encourage the use of the vernacular? A. Four-letter words, no, I don't.

Q. Are the adolescents whom you encounter normally in trouble with the law? A. Would you repeat that again?

Q. Are the adolescents whom you encounter normally in trouble with the law? A. I would say yes. The majority come to our attention because they have been in either school, in difficulty in either school or in the community or in the home.

Q. Do the majority of all adolescents come to the attention of your agency, Doctor? A. Only those that have difficulty in attending school, or obeying their parents, or in breaking the law.

Q. Does the average fourteen-year-old have such difficulty in doing these things that he is brought to the attention of your judicial agency? A. Doing what things?

Q. Breaking the law, and— A. Oh, yes. When they are involved in not going to school, [271] or stealing, or lying, or destroying property, or assaulting others, they are brought to our attention.

Q. Could you estimate for me how many fourteen-year-olds there are, male and female, within the City or County of Philadelphia? A. I couldn't give you exact figures, no. I will say that on the average in our court we process approximately 28,000 juveniles a year, the juvenile upper limit being eighteen.

Q. And what is the population of the jurisdiction in which your agency functions? A. The County of Philadelphia. That is 2,000,000 people.

Q. Doctor, have you ever tried to use "The Housewife's Handbook" in a clinical atmosphere? A. No, I wouldn't.

Q. No. I asked you whether you tried. A. Oh, no. I never did; no, sir.

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Q. Do you know whether the authoress's view toward sexual practice is widely held, or is held by other commentators on sex and sex in marriage? A. I don't know the exact number, but those men that I associate with rather closely do not hold to this type of sex behavior. I would say that the majority of psychiatrists that I am in contact with do not approve of, say, abnormal, aberrant sexual acts.

[272] Q. Have you ever heard of Van Develde? A. No, I didn't.

Q. V-a-n D-e-v-e-l-d-e. I am spelling it because I may have mispronounced it. A. No. I don't know who that is.

Q. You are unacquainted with Dr. Van Develde's works on marriage and sex? A. No, sir.

Q. Did you ever hear of "Love Without Fear" by Dr. Edward Chesser, Eustace Chesser? A. I heard about it. I didn't read the book.

Q. You have heard about it? A. Yes. I didn't read the book.

Q. Are you aware of the fact that Dr. Chesser in his work which was published by Signet Books in pocketbook form states:

We have seen how the tongue kiss can be employed to meet the tongue to caress the partner's mouth or body. It has often been used as a genital stimulation.

He then goes on to recommend this as one permissible form of sex play between two people. Are you aware of that view? A. Is that married people?

Q. The title of the book, Doctor, is "How to Achieve Sex [273] Happiness In Marriage." A. That means it refers to two persons indulging in that who are married to each other.

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Q. Yes. A. I would say it is permissible, yes.

Q. It is permissible? A. Between married people, yes.

Q. Between married people? A. Yes.

Q. In fact, don't most psychologists and psychiatrists and pastoral counselors agree this is permissible between married people? A. You mean tongue-kissing, you are talking about?

Q. Yes. A. Oh, yes. I don't object to it.

Q. I am talking about the genital kiss now, Doctor. A. I don't know what most think, but I would say that if this type of behavior does not replace the, say, the normal sex experience as the coitus with, say, or as organism, then, no, it would not be abnormal or aberrant between married men and women.

Q. And that is prevalent psychiatric opinion; is it not?

A. I would think so, yes.

Q. It is the prevalent opinion of marriage counselors?

[274] A. Married couples.

Q. Between married people. A. Yes.

Q. And I take it you do not approve of it between people who are not married simply because they are not married to each other? A. No. There is a little more than that. If this tongue stimulation of the genitals does not replace the sex act, in other words, does not lead to orgasm, it is not wrong. If it leads to orgasm in either partner, this is biologically wrong, or if you want to be moralistic, morally wrong as well.

Q. We have been talking about a practice, that is, the genital kiss known as what, Doctor, in medical terminology? A. Well, fellatio or cunnilingus.

Q. Do you consider these perversions between husband and wife? A. If it leads to orgasm in either partner, yes. If it is foreplay in sex, no.

Q. Do you recall testifying last year in a case entitled Commonwealth of Pennsylvania versus Herman Robbins? A. No. I do not recall it. What case is that?

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Rebuttal—Cross*

Q. Commonwealth of Pennsylvania versus Herman Robbins, the "Tropic of Cancer" case. A. Oh, yes, sir. Now, when you talk like that, yes, I do. I mean, names—yes, I do.

[275] Q. Do you recall identifying cunnilingus and fal-latio and all of these things as perversities without qualification as to the nature and relationships between the couple in question? A. I never said that. They are perversions of practice to the extent that, say, they were recommended in that book. As I say, foreplay in married couples not leading to sexual climax, it is not immoral. If it does, it is so. If it is practiced among unmarried people, it is wrong, immoral or illegal, if you want to put it that way, also.

Q. Do you recall testifying in that case:

Cunnilingus, the proximation of the mouth of one person on the female organ of another person,—

And then proceeding to identify cunnilingus as one of the well-known forms of sexual perversions? A. Yes. It is a perversion, no matter who practices it, but as I say, as part of the foreplay in married couples, if it does not lead to sexual gratification which is orgasm, it is all right to practice, but it is still a sexual perversity, regardless.

Q. Do you also regard the physical touching of the tactile sensation in love-play between a married couple as indecent? A. No, sir. I do not.

Q. Doctor, do you recall testifying in this case:

[276] This indecent touching of course includes the touching on private parts of the individual, both male and female, by the hand or perhaps of the mouth. A. Did I make that statement that you are reading.

Q. Yes. I am reading it, Doctor. Do you recall making that statement? That was my question. A. It is out of

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Rebuttal—Cross*

context. I would imagine that is referring to people who are unmarried or not married to each other. That would be indecent, yes. If it is a married couple, no.

Q. Doctor, if I show you a transcript of your testimony in that case do you think— A. I would be glad to see it. I never saw it.

Q. Do you think it might help you refresh your recollection of what you said on that occasion? A. You have got it there. I will be happy to read it.

Q. I asked you whether you think it would refresh your recollection as to what you said. A. You already refreshed my recollection. I am not denying.

Q. Is your recollection refreshed at this point? A. I know I testified in the court on this book, "Tropic of Cancer," as an obscene book, and gave my reason for it.

Q. Do you now also recall testifying:

"This indecent touching, of course, includes the touching on the private parts of the individual, [277] both male and female, by the hand or perhaps by the mouth"?

A. Yes. That was a definition I gave for that perversion.

[278] Q. Doctor, in that case you were also asked to express an opinion as to whether or not certain works were or were not obscene, were you not? A. Yes, sir.

Mr. Creamer: I object, your Honor. Now we carefully kept out of here the doctor's feeling as to the obscenity of the material. There is no reason to go into this collateral investigation.

The Court: Well, we will let it in.

Mr. Creamer: Pardon me, sir?

*Dr. Nicholas George Frignito—for Government—
Rebuttal—Cross*

By Mr. Dickstein:

Q. Do you recall that testimony? A. Yes, sir.

Q. Do you recall being asked whether you had ever read "Peyton Place"? A. Yes, that's right.

Q. And your answer was— A. I think no.

Q. You said no? A. I think. I remember seeing the movie. I believe that's what I saw, "Peyton Place."

Q. Doctor, I show you page 204 of the transcript in that case and call your attention to the testimony, and I ask you [279] to read it and tell me whether that refreshes your recollection as to what you said. A. Oh, yes, I guess I did. I remember seeing the movie, too, yes.

Q. Oh, you now recall that you did read the book? A. Yes. What is so horrible about that?

Q. When you read "Peyton Place," did you consider it obscene? A. Well, I wouldn't recommend it. I wouldn't say it was absolutely pornographic, but I considered it obscene, yes, not the movie as much as the book.

Q. Do you recall being asked whether you read any of the works of Mickey Spillane? A. Oh, that I didn't read. If I did it is a long time ago. I don't recall. I know I saw a lot of TV shows on that.

Q. I show you page 204 of the transcript in that case and ask whether that refreshes your recollection. A. It does.

Q. Did you read any Mickey Spillane? A. Yes, sir.

Q. How many copies of Mickey Spillane? A. Oh, I don't know, maybe one or two. That's the reason why I don't remember all the little details of these books.

Q. Did you consider them obscene? [280] A. A lot of Spillane's books are obscene.

Q. Pardon me? A. A lot of his books are obscene; not all of them.

Q. Are the books you read of Mickey Spillane's obscene? A. Well, I think so, yes.

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Q. Did you ever read "God's Little Acres," Doctor?

A. Yes, I think I did. You know, I saw movies on that, too. You know, I get confused, but I know I saw—

Q. I am asking you whether you recall reading the book, not the movie. A. I think partially, I think partially.

Q. I show you page 206 of the transcript in that case and ask if it refreshes your recollection as to whether or not you testified in that case that you had read "God's Little Acre"? A. Yes, it does.

Q. You have read "God's Little Acre"? A. Well, not completely. I read parts of it, yes, and I remember seeing the movie on it.

Q. Do you recall in the case which you testified expressing an opinion after stating that you had read it, you were asked, "Do you consider this book obscene?" A. Yes.

Q. Do you recall the question? [281] A. Yes.

Q. And your answer was— A. I think it was yes.

Q. Well, what is your answer now? A. I think it was.

Q. Have you read "Lady Chatterley's Lover," Doctor? A. In part, yes.

Q. Do you consider "Lady Chatterley's Lover" obscene? A. Not completely, no, I didn't. I don't think I did. Some of the passages—

Q. Do you recall your testimony in answer to this question in the case in which you testified in the Commonwealth of Pennsylvania v. Herman Robbin? A. Yes.

Q. What was your answer to that question in that case?

A. Well, it was obscene in parts. I think I said that. I said there were certain scenes and passages. I wouldn't put it down as hard core pornography.

Q. Doctor, I would like to read you some testimony and ask whether you recall these questions and these answers:

"Q. Have you read 'Lady Chatterley's Lover'?"

A. In part.

"Q. Do you consider that obscene? A. Yes, sir."

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[282] Do you recall those questions and answers being put to you? A. Yes.

Q. And do you recall those answers coming from you? A. Yes.

Q. Doctor, have you seen a nudist publication called "Sunshine and Health"? A. Yes, sir.

Q. Do you consider that obscene? A. A majority, yes.

Q. What do you mean by a majority? A. Most of their publications are obscene because they portray the completely nude body, men and women.

Q. Are you aware that the Supreme Court of the United States has held "Sunshine and Health" not to be obscene? A. Yes, yes, I am aware of that.

Q. Does this affect your opinion in any way? A. No, it doesn't.

Mr. Dickstein: No further questions.

Mr. Creamer: No questions, your Honor.

* * *

[285] Mr. Dickstein: Your Honor, I would now like to make a motion relating to the testimony of Dr. Firgnito.

The Court: Dr. who?

Mr. Dickstein: Firgnito, the Government's witness, the last gentleman that was heard yesterday.

The Court: Yes.

Mr. Dickstein: Mr. Creamer represented that the only purpose of Dr. Firgnito's testimony was to rebut matters raised in defense. In this connection Mr. Creamer stated that our witnesses had offered testimony on the potential effect of "The Handbook" on an adolescent.

I would like to make it perfectly clear at this time that no part of the direct testimony of our witnesses went to this proposition and the only testi-

Colloquy of Court and Counsel

mony on this subject came in response to questions asked by your Honor.

If the record is unclear I would like to make it perfectly clear that we object to all such testimony on the grounds of relevance and materiality under the tests stated by the Supreme Court.

At this point I would ordinarily make a motion to strike portions of Dr. Firgnito's testimony which went beyond matters raised in defense and went beyond the question of credibility of our defense witnesses. However, of course it is practically impossible to do so because such testimony is [286] intermixed. Instead, I would like your Honor to rule that no portion of that testimony shall have any affirmative probative value with respect to the elements of the obscenity counts since all such evidence would have had to be introduced during the Government's case. We have no objection to consideration of such testimony for the purpose of impeachment, the purpose stated by Mr. Creamer, but if Mr. Creamer wanted to put on a witness in an attempt to prove any of the essential elements of the offense it is an elemental principle of criminal procedural law that he would have had to do so in his own case and not merely by trying to denominate it as rebuttal testimony.

The Court: Mr. Creamer.

Mr. Creamer: Your Honor, I believe there is no disagreement here. I am not offering any of these rebuttal witness as affirmative evidence. I am offering them merely for rebuttal and I hope that your Honor will not consider any of them as affirmative evidence. That is, it is merely offered to rebut the other experts, so I have no objection at all to the statement that you merely consider it as re-

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buttal testimony and not affirmative evidence in itself.

Is that satisfactory?

Mr. Dickstein: That is satisfactory. Will that apply to all other witnesses in rebuttal?

[287] Mr. Creamer: It will apply to all other witnesses, your Honor.

Mr. Dickstein: Thank you.

Mr. Creamer: Merely rebuttal witnesses.

The Court: Not as affirmative evidence?

Mr. Creamer: That's right, sir.

The Court: All right. The record may so show. There is nothing else I can say if you agree on this proposition.

You will proceed now with the calling of what other witnesses you have.

Mr. Creamer: Thank you, your Honor.

Dr. Ford.

ANN HANKINS FORD, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. Creamer:

Q. Doctor, would you state your full name, please? A. Ann Hankins Ford.

Q. Dr. Ford, I wonder if you would give us a resume of your educational background. A. I am a graduate of the School of Medicine, the University [288] of Pennsylvania.

Q. In what year? A. 1940.

The Court: 1940?

The Witness: Yes. '40.

The Court: 1940. Thank you.

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The Witness: I then had residencies in psychiatry after the usual internship at the Hospital for Mental and Nervous Diseases—

The Court: Will you keep your voice up a little bit? The acoustics in this room are bad and I can't hear you. I am very close. I don't know whether the gentlemen out there can hear you or not, but there is a fan going here and all that sort of thing. It is a little difficult. This is a large room. I would appreciate it. Thank you.

The Witness: Do you want me to repeat that?

The Court: Yes.

The Witness: I had a fellowship in psychiatry at the Pennsylvania Hospital for Mental and Nervous Diseases. I then had the first fellowship in psychiatry granted by the Rockefeller Foundation to a woman at the Institute of the Pennsylvania Hospital. I worked for a number of years as an associate of the late Dr. Edward Strecker, professor of psychiatry at the University of Pennsylvania. I am a diplomate of [289] the American Board of Neurology and Psychiatry which means that I am certified by the American Board. I worked—well, then I taught at the University of Pennsylvania and the Woman's Medical College in the departments of psychiatry. I was on the staff of the Philadelphia General Hospital, the Woman's College Hospital, the Woman's Hospital, the Pennsylvania Hospital for Mental and Nervous Diseases and the Institute of the Pennsylvania Hospital. I then became chief of psychiatry at the Woman's Hospital, Pennsylvania, and head of the Ann H. Ford Clinic in that hospital.

I am now retired head and consultant to that hospital in private practice doing psychoanalysis.

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Rebuttal—Direct*

By Mr. Creamer:

Q. How many years have you been actually engaged in the practice of psychiatry? A. Since 1941.

Q. Doctor, have you read "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony? A. Yes.

Q. In your opinion based on your education and experience does this book have any medical value in the field of psychiatry or psychology? A. No.

Q. Why? [290] A. In the field of psychiatry in which I am involved it would be a destructive book. The book itself is written by or about a very disturbed person, one who is emotionally very immature and who has not progressed emotionally from the age of childhood when people are in a normal homosexual stage.

This is not about a woman; it is about a homosexual woman. This woman in no way indicates in her book that there is anything except the wish to be a man, the wish to have a penis, and she goes through all of these diverse and exhausting means to procure this organ.

The Court: To procure—was was the last word?

The Witness: This organ.

The Court: This organ?

The Witness: This organ.

By Mr. Creamer:

Q. Could you give us a little more background on her psychiatric condition as it appears in the book, that is, with regard to her thoughts on the clitoris and other things as developed in the book, what that is in terms of her psychology make-up? A. In the embryonic development of the human fetus the fetus is bisexual, and as the sexual organs develop, the predominant one matures and the recessive organ shows remnants. The clitoris [291] is

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a remnant of the male penis from fetal development and this is so emphasized in this book, it is the only penis this woman has, and she all but works it to death. She must have this recognized. She must have great male attention paid to her substitute penis, and in this way she is not making love to these men. This is not a lovers' relationship; it is a matter of demeaning, sullyng these men whom she comes in contact with.

This doesn't occur to her because she doesn't evidently understand her own problem. Her homosexual activities are carried out in an acting out process whereby she satisfies her homosexual needs by snatching some other woman's penis, that is, some other woman's husband, and in this way she makes a vast collection of male organs at the expense of some other woman usually.

Q. Does this book have any medical message to it? A. Well, the only message I found in the book is if you are dissatisfied with your husband look around and get some other man.

Q. Doctor, based on your education and experience would this book have any value to you in the treatment and counseling of your patients? A. No, I think it would be more disturbing. Here is a woman who is so confused, and she is so far from understanding [292] what her problem is, that someone in a similar situation—and there are many of them—promiscuity is certainly not an act of love, but an act of hostility, and it would only reinforce the anguish and the feelings of hostility that my patient would have.

Mr. Creamer: Thank you, Doctor. No further questions.

The Court: Will you give me the last answer please?

(The answer was read).

The Court: Cross-examine, please.

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Cross-examination by Mr. Dickstein:

Q. Dr. Ford, are your patients normally people who are disturbed in one way or another? A. Yes.

The Court: Will you repeat that question? For some reason or another I don't hear well this morning.

Mr. Dickstein: Will you repeat it?
(The testimony was read).

[293] *By Mr. Dickstein:*

Q. You indicate, then, that the book might tend to fortify or intensify the anxieties or hostilities of your particular patients. That is your empirical experience, is that correct? A. It might tend to do that, yes.

Q. Doctor, from your ability to draw a psychiatric profile of the authoress of this book from merely reading the book, I take it you consider it to be a statement of a true case of pathology, disturbance, or whatever you might want to call it, is that correct? A. A true case of pathology? I am having trouble hearing, too.

Q. Let me start again. You have on the witness stand

The Court: May I interrupt you?

Please keep your voice up. I don't know, for some reason your voice seems to drop and I can't hear you. I don't know whether the witness can hear you.

By Mr. Dickstein:

Q. You have on the witness stand drawn a psychiatric profile as you see it of the authoress of the book from a reading of the book, have you not? A. Yes.

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Q. You believe your comments are valid, do you not?

A. Yes.

[294] Q. Does what you read in the book seem to be consistent with the particular forms of disturbance and the roots of disturbance that you have seen in other similar, real cases? A. Yes.

Q. Do you know of any other books which are autobiographical first-person accounts by women of their sexual activities and attitudes? A. Not offhand.

Mr. Creamer: Objection, your Honor. I don't think that that is relevant.

The Court: Objection overruled.

What did the witness say?

The Witness: Not offhand, I don't.

The Court: Not offhand.

By Mr. Dickstein:

Q. Do you think this book, in the sense of it being an autobiographical account by a woman of her sexual attitudes and activities, has some value, instructional value, to a psychologist or a psychiatrist? A. This particular book, no.

Q. Well, does it present a case history in a sense? A. When one reads the first chapter, it has been read. The rest is repetitious.

Q. You mean a trained psychiatrist can deduce everything [295] else that follows from what appears in the first chapter? Is that what they are saying? A. In a sense, yes.

Q. Are you saying that it is repetitious of other case histories which all psychiatrists are aware of? A. It has its uniqueness here and there.

The Court: Will you keep your voice up, please? I can't hear you.

A. It has its uniqueness here and there.

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By Mr. Dickstein:

Q. What are those points of uniqueness? A. Well, the dripping vagina, the blood running down the legs, the graphic, graphic descriptions of the second the penis is introduced into the body, the repetition of her whole body and being vibrating with the ecstasy of sensation.

Q. Was this a unique expression within your experience?

A. Yes.

Q. Did you learn something from reading about it?

A. No.

Q. Something in your framework as a psychiatrist?

A. Nothing particularly new, no.

Q. Did it add in any way to your knowledge of psychiatry or case histories or the particular manifestations of this type of generalized disturbance? [296] A. No.

Q. But it did have some unique expressions of manifestations of this type of disturbance, did it not? A. Well, I presume the way each face is unique. The eyes, nose and mouth of each face are similar, but they are unique.

Q. Doctor, you testified that the authoress's homosexuality was manifest in her continuously borrowing the penises of other women, that is, their husbands', with which to engage in sexual activity. Have I approximately stated what your testimony was? A. Yes.

Q. From your reading of the book can you state how many instances there are described in that book in which the authoress indicates that she had sexual relations with a married man after she reached her majority? A. No, I can't.

Q. Do you know of any specifically, Doctor? A. In the book?

Q. Can you point to any sexual activity described in the book by this authoress after she attained her majority?

A. Yes. There are several in the book.

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- Q. Could you point—do you have a copy of the book?
A. Oh, boy!
I have a copy.
It doesn't matter whether it is somebody's husband [297] or whether this woman is some man's mistress. This is a very pleasing experience for this woman, to take some other woman's man away from her.
Q. Well, would you say this book then teaches adultery?
A. Not necessarily.

Mr. Dickstein: No further questions.
Mr. Creamer: No questions, your Honor.
The Court: Thank you, Doctor.
(Witness excused).

ADOLPH EMIL KANNWISCHER, having been duly sworn,
was examined and testified as follows:

Direct examination by Mr. Creamer:

- Q. Reverend Kannwischer, I wonder if you would describe your educational experience, please. A. B. A., University of Rochester.
Q. What year, sir? A. 1937.
M. A., Columbia University, 1943.
S. T. M., Union Theological Seminary, New York City.

The Court: Just a moment. What is the degree?
[298] The Witness: S. T. M., Master of Sacred Theology.
Ph. D., New York University.

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By Mr. Creamer:

Q. Would you give us your religious background, that is, your theological training, and what sect you belong to.

A. I am a Baptist minister, ordained Baptist minister.

Q. Are you affiliated with any institutions or churches in particular? A. I am a member of a church. I am presently a professor of psychology and director of guidance at Eastern Baptist College.

Q. Were you ever affiliated with any other institutions?

A. Yes, sir.

Q. Would you state what they were. A. I was a federal prison chaplain for nine years.

Q. At what institution? A. Lewisburg, Pennsylvania; Tallahassee, Florida; Chillicothe, Ohio.

Q. Were you ever affiliated with any church in New York City, Reverend? A. Yes, sir, I was pastor of the Ridgewood Baptist Church, Ridgewood, Long Island, for twelve years.

Q. When were those twelve years? What is the span? A. 1937 to 1948.

[299] Q. Have you had any training in psychology as part of your education, Reverend? A. Yes, sir.

Q. Would you describe that. A. As part of my master's work at Columbia I had several courses at the New York Psychiatric Institute in social psychiatry. I had some psychology as part of my undergraduate work.

Q. Do you belong to any professional or religious organizations, Reverend? A. Academy of Religion and Mental Health is one of them.

Q. As part of your experience have you acted in the capacity of counselor? A. Yes, sir, in all phases of my work as pastor, as chaplain, and in my present position.

Q. Reverend, have you read "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony? A. Yes, sir.

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Q. Reverend, based on your education and experience, would you use this book in counseling parishioners or in counseling people? A. No, sir.

Q. Why would you not use it? A. I would regard it as detrimental to a person who already [300] is having problems. I see no positive value in it.

Mr. Creamer: No further questions.

The Court: Cross-examination, please.

Mr. Shapiro: May we have a few moments, Your Honor?

The Court: Yes.

Mr. Dickstein: No questions.

Mr. Creamer: Thank you very much, Reverend.
(Witness excused.)

Mr. Creamer: If Your Honor pleases, that concludes the Government's rebuttal testimony.

The Court: Would the defense like to produce anything, any testimony?

* * *

[302] Mr. Shapiro: Your Honor, the defense now, after the close of the entire case, renews its motion for judgment of acquittal. I am renewing the motion we made at the close of [303] the Government's case and again making our motion for judgment of acquittal.

Now, before Your Honor hears me with respect to this, there is another matter which we feel perhaps should not be on the record, and we ask that the Court grant a recess to consult with counsel in chambers with respect to this problem.

The Court: Consult with counsel in chambers?

Mr. Shapiro: Yes, Government counsel and defense counsel.

The Court: But not the Court?

Mr. Shapiro: And of course with the Court.

The Court: I see. We will be glad to do that.

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We will see if we can use Judge Kirkpatrick's chambers.

Mr. Creamer: If Your Honor please, if there is any argument on a motion for a judgment of acquittal, I would prefer it to be incorporated in tomorrow's argument.

The Court: No, I will hear that now, because if there would be an acquittal by the Court on any one of the number of counts, we wouldn't have to proceed on all the counts then in the case.

Mr. Creamer: Very well, sir.

Mr. Shapiro: Thank you.

The Court: You want to have a conference now?

[304] Mr. Shapiro: Before we get into the motion.

The Court: We will call a recess for ten minutes.

Depending on what the argument is, you will want the court stenographer present?

Mr. Shapiro: I don't really think so, Your Honor.

The Court: You don't think it is necessary, very well.

Mr. Shapiro: If you think it is necessary, I thought we ought to have him stand by, but I really don't think so.

The Court: All right.

(Recess, 10:40 o'clock A.M. until 10:50 o'clock A.M.)

(Discussion off the record in chambers.)

[305] Mr. Shapiro: If the Court please, in support of the defense's motion for judgment of acquittal I would like to review for just a moment the basic elements of the crime with which the defendants are charged.

* * *

[330] We believe that in this case this Court has no other choice but on the basis of the record before it to dismiss this indictment and grant the defense's motion for acquittal.

Thank you, sir.

The Court: You may make your motion now in regard to whatever you had in mind.

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Mr. Creamer: Thank you, sir.

If Your Honor please, the Government moves to strike defense Exhibits 1—

The Court: Just a moment, please.

Mr. Creamer: Yes, sir.

The Court: I have a chart of the exhibits. I can follow you.

Now, proceed, Mr. Creamer.

Mr. Creamer: The Government moves to strike defense Exhibits 1 through—

The Court: No. 1?

Mr. Creamer: D-1 through D-8.

The Court: Just a moment.

Mr. Creamer: Yes, sir.

The Court: I have 1 without a note.

Mr. Creamer: There is a picture of a pig on the front.

The Court: Is that one of the little booklets? [331]
Let me see it.

Mr. Creamer: Yes, sir. These are the exhibits that I am now moving to strike.

Mr. Shapiro: That's the hard-core pornography, Your Honor, D-1 through D-8.

The Court: Well, I haven't seen any of these.

Mr. Creamer: No, sir.

The Court: All right.

Mr. Creamer: Your Honor, the Government moves to strike these exhibits.

The Court: In other words, these are all introduced as hard-core pornography?

Mr. Shapiro: That's right, sir.

The Court: On which I gave counsel for the Government leave to strike at the end. All right.

Mr. Creamer: We move to strike these on the ground that they are irrelevant and immaterial to the trial of this case. There has been no evidence to the effect that these are similar works as to the one on trial. I am sure they

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are not going to allege it at this point. We base this on the Wilmack decision that these should be stricken from the record.

The Court: Just a moment, please. I have D-1 to D-8. Refused.

[332] Mr. Creamer: If Your Honor please, to be consistent I also move to strike the testimony of Dr. McCormick with regard to these exhibits.

The Court: Refused.

Mr. Creamer: The Government moves to strike defense Exhibit No. 9 which is the "Fanny Hill" work on the same grounds as previously stated.

The Court: Refused.

Mr. Creamer: And to be consistent the Government moves to strike the testimony of Mr. Macdonald with regard to "Fanny Hill."

The Court: Refused.

Mr. Creamer: The Government moves to strike defense Exhibits D-10 through D-43 on the same basis.

The Court: Refused.

Mr. Creamer: The Government respectfully moves to strike the testimony of Dr. McCormick in which he expressed responses of the average man on the basis that he was not qualified to speak concerning the average man and the impact on the average man.

The Court: Well, that's argument, so far as I am concerned, to a jury and an argument that you should make to me tomorrow.

Refused.

[333] Mr. Creamer: I would make that motion to strike with regard to each of the other expert witnesses.

The Court: Refused.

Mr. Creamer: Where they testified about the community standards or the average individual.

The Court: Refused.

Mr. Creamer: Thank you, sir.

*Rev. Adolph Emil Kannwischer—for Government—
Rebuttal—Direct*

The Court: Now, gentlemen, because of the problems you have raised I will not be able to rule on this motion until tomorrow morning, so that you will have to be prepared, and I will rule on it tomorrow morning at 10:00 o'clock. You have cited too many cases for me to rule on it at 2:00 o'clock, so we will now recess until 10:00 o'clock tomorrow morning and we will proceed then to hear the arguments of counsel with regard to the matters before the Court.

* * *

[335] Mr. Shapiro: Your Honor said that he would make a ruling with regard to the motion for acquittal this morning and subsequent to that we have one preliminary matter.

The Court: The motion is refused.

Mr. Shapiro: Now, we have one preliminary matter, Your Honor, and that's with regard to Rule 23(c). The defense requests in accordance with Rule 23(c) of the Federal Rules of Criminal Procedure that in the event of a finding of conviction the Court make findings of fact especially with regard to each essential element of the [336] crime.

Mr. Creamer: Pardon me, Your Honor. I would like an opportunity to explore this since it is not a matter that we are faced with at this time.

The Court: The ruling will be reserved.

Mr. Creamer: Thank you, sir.

* * *

[362] Mr. Creamer: Sir, could I interrupt one moment?

The Government has no objection to specific findings of fact as requested by the defendants.

The Court: We will have to decide that at the end of the argument—

Mr. Creamer: Yes, sir.

Colloquy

The Court: —because we have this problem of the next case.

Mr. Creamer: Yes, sir.

The Court: And I do not believe that we will be able to do it, but I have to determine that later on.

Mr. Creamer: I don't think there will be any necessity for a time discussion on that.

The Court: I will determine that before tomorrow morning; maybe late today, and I will let you all know.

* * *

[393] Mr. Creamer: * * *

Now Mr. Shapiro has indicated that the Government concedes that all the publications are not hard-core pornography. We do not concede either as to Liaison or the Handbook.

* * *

[398] The Court: Gentlemen, I will review your arguments and various other matters that I have to review and arrive at a decision by tomorrow morning, somewhere between 10:00 and 12:00; in other words, before I take my next case.

* * *

[401] The Court: In the matter of the United States of America versus Ralph Ginzburg, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc., I find the defendants guilty on all counts.

There was a request by counsel for the defendants in regard to special findings of fact, and I will find the facts especially as requested by defendants' counsel. At the earliest possible time they will be found.

Meanwhile, I would like to request the Government through Mr. Creamer to submit to me proposed findings.

Mr. Creamer: Yes, sir.

* * *

**Defendants' Motion in Arrest of Judgment or, in the
Alternative, for a New Trial**

Come now defendants and move for an order granting arrest of judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

As grounds for this motion, defendants allege:

(1) the indictment fails to allege a violation of 18 U. S. C. § 1461;

(2) the Government failed to prove that either "Eros, No. 4", "Liaison News Letter, Vol. I, No. 1" or "The Housewife's Handbook on Selective Promiscuity" was obscene under 18 U. S. C. § 1461;

(3) the trial court failed to read "The Housewife's Handbook on Selective Promiscuity" prior to ruling on both defendants' motion to dismiss the indictment and defendants' motion to acquit at the close of the Government's case; and

(4) the trial court failed to make findings as required by Rule 23(c) of the Federal Rules of Criminal Procedure.

As further grounds for this motion, defendants refer this Honorable Court to the Memorandum of Law annexed hereto.

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Special Findings of Fact, Dated August 6, 1963

BODY, J.

August 6, 1963

After trial held before the Court upon waiver of jury by defendants herein, and pursuant to Rule 23(c) Federal Rules of Criminal Procedure, and request therefor made by defendants, the following special findings of fact are made a part of the record in this case and the same shall apply to each and every defendant on the appropriate counts of the indictments:

1. The stipulation entered into by counsel for defendants and counsel for the government, and approved by this Court, dated May 8, 1963, filed the same day (Clerk's File, Document Number 12) is hereby incorporated in its entirety as a finding of this Court.
2. The mailing of "Liaison" Vol. 1, No. 1, 1962; "Eros" Vol. 1, No. 4, 1962, and "The Housewife's Handbook on Selective Promiscuity" (referred to hereinafter as "Liaison", "Eros" and "The Handbook" respectively) was accomplished by large quantity distribution through a large mail order firm.
3. Defendants sought initially to obtain mailing from Blue Ball, Pennsylvania; secondly, from Intercourse, Pennsylvania; and finally succeeded in making arrangements for mailing from Middlesex, New Jersey, from which place all or substantially all of the mailings issued.
4. The particular places referred to in Finding No. 3 were chosen in order that the postmarks on mailed material would further defendants' general scheme and purpose.
5. The Handbook is a vivid, explicit and detailed account of a woman's sexual experiences from age three years

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to age thirty-six years which goes substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein.

6. The Handbook appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

7. The Handbook is patently offensive on its face.

8. The Handbook treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

9. The Handbook has not the slightest redeeming social, artistic or literary importance or value.

10. There is no credible evidence that The Handbook has the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine.

11. Liaison consists primarily of matters relating to sex and in doing so it goes beyond customary limits of candor, exceeding contemporary standards in description and representation of the matters described therein.

12. Liaison primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest of the average individual.

13. Liaison has not the slightest redeeming social, artistic or literary importance or value.

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14. Liaison is patently offensive on its face.

15. Liaison treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

16. While portions of Eros are taken from other works and may have literary merit in context, Eros appeals predominantly, taken a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

17. The deliberate and studied arrangement of Eros is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of non-offensive material.

18. Eros treats sex in an unrealistic exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

19. Eros has not the slightest redeeming social, artistic or literary importance or value taken as a whole.

In conclusion, after a thorough reading and review of all the indicted materials, this Court finds that said materials are compilations of sordid narrations dealing with sex, in each case in a manner designed to appeal to prurient interests. They are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake.

/s/ RALPH C. BODY,
J.

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or for New Trial**

The following Special Findings of Fact which were previously entered by the Court on August 6, 1963 are hereby incorporated into and made a part of this opinion:

SPECIAL FINDINGS OF FACT

1. The stipulation entered into by counsel for defendants and counsel for the government, and approved by this Court, dated May 8, 1963, filed the same day (Clerk's File, Document Number 12) is hereby incorporated in its entirety as a finding of this Court.

2. The mailing of "Liaison" Vol. 1, No. 1, 1962; "Eros" Vol. 1, No. 4, 1962; and "The Housewife's Handbook on Selective Promiscuity" (referred to hereinafter as "Liaison", "Eros" and "The Handbook" respectively) was accomplished by large quantity distribution through a large mail order firm.

3. Defendants sought initially to obtain mailing from Blue Ball, Pennsylvania; secondly, from Intercourse, Pennsylvania; and finally succeeded in making arrangements for mailing from Middlesex, New Jersey, from which place all or substantially all of the mailings issued.

4. The particular places referred to in Finding No. 3 were chosen in order that the postmarks on mailed material would further defendants' general scheme and purpose.

5. The Handbook is a vivid, explicit and detailed account of a woman's sexual experiences from age three years to age thirty-six years which goes substantially beyond cus-

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tomary limits of candor exceeding contemporary community standards in description and representation of the matters described therein.

6. The Handbook appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

7. The Handbook is patently offensive on its face.

8. The Handbook treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

9. The Handbook has not the slightest redeeming social, artistic or literary importance or value.

10. There is no credible evidence that The Handbook has the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine.

11. Liaison consists primarily of matters relating to sex and in doing so it goes beyond customary limits of candor, exceeding contemporary standards in description and representation of the matters described therein.

12. Liaison primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest of the average individual.

13. Liaison has not the slightest redeeming social, artistic or literary importance or value.

14. Liaison is patently offensive on its face.

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15. Liaison treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

16. While portions of Eros are taken from other works and may have literary merit in context, Eros appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

17. The deliberate and studied arrangement of Eros is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of non-offensive material.

18. Eros treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

19. Eros has not the slightest redeeming social, artistic or literary importance or value taken as a whole.

DISCUSSION

On March 15, 1963 the Grand Jury in the Eastern District of Pennsylvania returned a 28 count indictment charging defendants with mailing obscene publications and advertisements for those publications in violation of 18 U. S. C. 1461. Defendants filed a motion to dismiss various counts of the indictment under Rule 12 of the Federal Rules of Criminal Procedure. Subsequent thereto, the Government filed a motion to strike the affidavit and exhibits appended to defendants' motion to dismiss the indictment. Oral argument was heard on both of these motions on May 17,

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1963, and on that day the Court granted the Government's motion. On May 23, 1963 the Court denied defendants' motion to dismiss the indictment. From June 10 to June 14, 1963 the case was tried before the Court without a jury, and all defendants were found guilty on all counts. Defendants have filed a Motion in Arrest of Judgment, or, in the alternative for a New Trial, which motion is now before the Court.

A stipulation of counsel has been filed and approved by the Court. In this document the United States agrees that the advertising material (attached as exhibits to the stipulation) is not in and of itself obscene. In 1960, defendants admitted that said advertising material mailed by defendants on the occasions alleged in the indictments with full knowledge of the nature of the contents thereof. In addition, counsel agreed that the alleged non-mailable materials, Liaison, Eros and The Handbook, were to be considered a part of the indictments as though fully set forth at length therein. Oral argument on the motions was waived by counsel. These motions are: a motion in arrest of judgment and, in the alternative, a motion for a new trial. In support of both motions defendants raise four issues.

**ALLEGED FAILURE OF THE COURT TO COMPLETELY
READ THE INDICTMENT BEFORE RULING ON THE
SUFFICIENCY THEREOF**

During the presentation of the defendants' case the Court made a statement with respect to The Handbook which indicated that the Court had not read parts of The Handbook. Prior to this incident, the Court had denied the defendants' motions for dismissal of the indictment and for acquittal at the close of the Government's case. The issue presented by this situation is an issue only if

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one assumes that the stipulation requires that the Court consider the materials as part of the indictment. We assume this to be the case for purposes of disposing of defendants' contentions.

It is axiomatic that in ruling on motions involving the sufficiency of an indictment, the Court should read that indictment. We agree, therefore, that the indictment should be read by the Court. However, the Court did read the indictments involved herein before any decisions were made on any aspects of this case. It is true that not all, that is to say, not each and every word or sentence of each of the indicted materials was read in advance of all of the Court's rulings. Nevertheless, the original indictments were read. Moreover, the Court read enough of the indicted materials to be able to rule as a matter of law that the Government had made out a prima facie case. We do not deem it necessary to read each and every word or sentence of the indicted materials in an obscenity case in order to ascertain whether there is a prima facie case.

While it is true that in considering material in an obscenity case, the work as a whole must be examined; *Roth v. United States*, 354 U. S. 476 (1957); it is not necessary to make a detailed and exhaustive examination on preliminary motions. Common sense dictates a realistic approach to this matter. The Handbook has 240 pages exclusive of introductory material. The material therein is extremely boring, disgusting, and shocking to this Court, as well as to an average reader. It was simply too offensive to stomach in the first instance. Even a fast reading, skipping the obviously repetitious phrases and descriptions, readily discloses the impact and essence of the book.

The rule is that when a defendant presents testimony and other evidence after a motion for acquittal has been overruled, the objections to the denial of his motion are waived, *United States v. Calderon*, 348 U. S. 160 (1954).

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On the merits, since the Trial Court has since read all of The Handbook word by word, if there was error it is harmless. If in fact the material is obscene as a matter of fact and law, defendant was not prejudiced. This case was tried without a jury and the ultimate test after the case was submitted to the fact finder was much higher than it was when the Court disposed of defendants' pre-trial motions.

FAILURE OF THE TRIAL COURT TO ENTER SPECIAL FINDINGS
CONCURRENTLY WITH THE GENERAL FINDING

It may be that better practice in many criminal cases calls for the entry of special findings at the time the general finding is made when the Court sits without a jury. *Benchwick v. United States*, 297 F. 2d 330 (9th Cir. 1961). This does not mean that it is required that both types of findings be made simultaneously. No case has been cited by counsel which so holds, and in like manner, exhaustive research discloses no such rule as contended for by defendants.

During the trial the Court made it clear to counsel on more than one occasion that the entry of special findings would be delayed beyond the entry of a general finding if a general finding of guilty was to be entered on any of the counts. There were no objections by defendants' counsel to this proposed procedure. Thus, any objection to the delayed entry of special findings was waived by silence on the record. Likewise after verdict was rendered by the Court, no objections were stated for the record at that time.

On the merits, this was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. This is the nature of the

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case. It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer. Defendants were not precluded from submitting findings but apparently chose not to do so. We find no merit in this issue raised by them, apparently as an afterthought.

OBSCENITY

The remaining contentions of defendant attack the decision of the Court that as a matter of fact and of law the indicted materials are obscene under 18 U. S. C. 1461.

In order that freedom of speech may remain protected and inviolate, the law requires definite standards for a finding of obscenity. These standards are set forth generally in the case of *Roth v. California*, 354 U. S. 476 (1957). All ideas, no matter how obnoxious, unorthodox or controversial are protected. If material has any socially redeeming importance it is protected. Beyond this, material to be obscene must encroach upon significant interests of society, and thereby injure society without justification. Material embodied in permanent form and distributed generally does this when it is obscene. *Roth v. California, supra*. Something is obscene according to the *A. L. I., Model Penal Code*, § 207.10(2):

“ * * * (I)f, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters * * * .”

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Roth v. California, *supra*, at page 489, requires further that the material to be obscene must appeal in the above manner to the prurient interest of the average person, applying contemporary community standards. This has been held to mean that the standard is not to be applied from the point of view of particularly susceptible persons in the community. *Manual Enterprises v. Day*, 370 U. S. 478 (1962).

In deciding whether the subject materials are obscene, each must of course be separately treated.

"LIAISON" VOL. 1, No. 1

Liaison is a newsletter or periodical folder type of publication consisting of commentary from various sources with a general editorial treatment. Specifically it deals with such subjects as "Slaying the Sex Dragon", "Semen in the Diet" and "Sing a Song of Sex Life." The material covers the most perverse and offensive human behavior. While the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit. We agree. If there is any socially redeeming value in this material it must come from what is advocated or from its entertainment value. There are jokes and rhymes which clearly go beyond contemporary community standards of humor, even in applying liberal night club standards. The remainder of the material is of the same nature and exceeds the standard in the same manner.

One could take an entirely different view of some of the material in *Liaison* if it were artfully contrived or manipulated in a literary manner by incorporation into a work of merit to serve a legitimate purpose of an author in recording human experience or in seeking to accomplish a worthy objective. See, for example, *Grove Press, Inc. v.*

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Christenberry, 276 F. 2d 433 (2d Circ. 1960) where it was held that the book *Lady Chatterley's Lover* was not obscene.

Unfortunately, however, *Liaison* is designated obviously and solely for the purpose of appealing to the prurient interest of an ordinary person. The only idea advocated is complete abandon of any restraint with regard to any form of sexual expression. This "idea" is nothing more than could be advocated by the most flagrant pornography, samples of which were submitted to the Court by defendants as examples of obscenity. Ideas must go beyond this point in order to be protected. The alternative is the absence of any restraint on written material from the point of view of obscenity.

"EROS" VOL. 1, No. 4, 1962

Eros is a carefully contrived magazine or periodical type of publication with a hard cover and glossy paper. It is replete with photographs and includes reproductions of recognized works of art. Nevertheless, as in the cases of *Liaison* and of *The Handbook* the dominant appeal is to pruriency. The works of art, such as biblical quotations and reproductions of the creations of recognized artists, are merely a facade to disguise and protect the basic purpose and effect of the entire work. This basic purpose and effect becomes evident as one progresses through the pages.

Although it is difficult to classify all of the articles in *Eros* into specific categories, there is a clearly defined arrangement to the material. To some, several articles might be considered innocuous, only slightly erotic and possibly not obscene in and of themselves. These are: "New Twists and 3 Great Trysts"; "The Jewel Box Revue", the series of photographs on marriage, circa 1903; *The Short Story* by Ray Bradbury; "Memoirs of a Male Chaperon"; "President Harding's Second Lady"; "Was Shakespeare

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a Homosexual"; "Sex and the Bible"; and perhaps Ivan Graznis' version of "Lysistrata". If the entire work consisted merely of these articles there might be no finding of obscenity in this case. This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect and since the work must be considered as a whole, material which might be innocuous alone partakes of the obscenity elsewhere in Eros and becomes part and parcel of the overall plan and intent of the work. It is the opposite of the usual situation as in a novel where the dominant interest and theme is of social importance, and what would be patent obscenity standing alone is insulated and protected and saved from condemnation because of the work of art in which it is incorporated. *Grove Press, Inc. v. Christenberry, supra.*

Eros is the reverse situation from Lady Chatterley's Lover. There the author used material which, *taken out of context*, would have been clearly obscene. Nevertheless, the court found no obscenity because of the saving grace of the book as a whole. Eros has no saving grace. The items of possible merit and those items which might be considered innocuous are a mere disguise to avoid the law and in large measure enhance the pruriency of the entire work. The only overriding theme of Eros is the advocacy of complete sexual expression of whatever sort and manner. The most offensive pornography imaginable, examples of which were submitted by defendants as exhibits in this case, has the same dominant effect and purpose. Even so, of course, the dissemination of the idea of complete sexual freedom cannot constitutionally be punished. Therefore, it must be the *manner* of dissemination which is objectionable.

In considering the manner of expression of the idea then, we come to the work itself in its obscene portions. The articles called: "Frank Harris, His Life and Loves"

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including "My Life and Loves" by Frank Harris; "Bawdy Limericks" and the "Natural Superiority of Women as Erotocists" and "Black and White in Color" are such that standing alone, one has little difficulty in finding all of the requisite elements of obscenity. For example: "Bawdy Limericks" consists of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior. Also by way of example: the series of pictures, "Black and White in Color", constitutes a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination. This material meet defendants' own experts' definition of obscenity as well as counsel's legal definition.

Pruriency is required and is defined as an itching longing, morbid or shameful sexual desire. *Roth v. California, supra*. When material creates in the reader shame and guilt feelings simultaneously with sexual arousal, the result is usually obscenity. The material listed above clearly qualifies. There is no notable distinction between the aforesaid, taking each one as a whole, and the admittedly obscene material which was in evidence for comparison purposes.

The impact of these articles and items is sufficient to permeate the entire volume of Eros. By reading the article "A Letter from Allen Ginsburg" it becomes evident that the intent of the disseminator here was to cause this permeation, i.e., this "Letter" is a statement of the purpose of Eros. It is clear that there is no possible other way to view the matter. When material is composed of several portions, not related except insofar as each deals with sex in various forms, and at the same time this material includes obscene items, if these items are tested standing alone and if at the same time a single purpose of destruction of all barriers against sexual behavior of any kind is advocated along with the advocacy of removal of restraint by government over the dissemination of any written material

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whatsoever, there is but one conclusion. That conclusion is: there is specific intent to destroy any limitations whatsoever over any medium of human communication regardless of the extent of abuse of that medium through the use of obscenity. Therefore, defendants are in the unsavory position of advocating that obscenity should be disseminated, and at the same time they are deliberately purveying material through the mails which material is designed to break down those barriers imposed by the statute.

The inserting of innocuous material along with obscene material cannot shield the latter. If it could, the Bible itself could readily be rendered obscene, and yet could be disseminated without restraint, merely though the expediency of illustrating sexual references with grossest pornographic photographs and by giving the participants biblical names. The answer is clear. It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity containing excerpts from recognized works of art.

It is interesting to note that in defining pornography, defendants' expert stated that it is common in such material that matters usually treated with respect, such as religion, are juxtaposed with and mocked by the writer. Inaccuracy and imaginary psychotic references to sexual activity is rampant in such works. Eros contains these elements. The front and back covers and the lead article deal with the Bible itself. "Bawdy Limericks" meets the test of bizarre and unrealistic treatment of sex. "The Sexual Side of Anti-Semitism" is headlined with a paragraph taken from the mouth of a psychotic person. These examples, and those elsewhere in this opinion, are offered as typical and are not by any means designed to constitute an exhaustive exposition of all of the material relevant to a finding of obscenity in detail. To do this would require a good-sized novel. Defendants press us for a quick dis-

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position in order that their business not be ruined since they fear to continue publishing in the face of the finding of guilt. We, therefore, doubt that defendants are interested in a large volume of discourse in this opinion.

**"THE HOUSEWIFE'S HANDBOOK ON SELECTIVE
PROMISCUITY" BY REY ANTHONY**

The Handbook requires little discussion. This book is of a kind with the above-mentioned admittedly hardcore pornography. It is an explicit description of a woman's sexual experiences from early childhood and thereafter throughout most of her life. It purports to be, and the authoress so stated under oath, a factual and highly accurate reporting of actual occurrences. In fact Mrs. Lillian Maxine Serett, the authoress, stated: "I have lived every minute of it, or every page of it * * *" (N.T. page 121). We doubt the accuracy of this book. It also easily meets the previously mentioned tests of bizarre exaggeration, morbidity and offensiveness.

The Handbook's description of various sexual acts is astounding. As in the case of *Liaison*, no literary merit is ascribed to the book. Its sole claim to redeeming value is its alleged value as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. Any testimony to this effect is expressly disbelieved by this Court. One must regretfully note in passing that teen-age children were, and would be in the future, "ventilated" with this book by the witness who was alleged to be an expert clinical psychologist and also was an ordained minister. This same witness shocked the writer by saying that this book should be in every home and available for teen-agers for guidance in sex behavior, but in my opinion misbehavior.

The Handbook, standing bare of any socially redeeming value, is a patent offense to the most liberal morality. The

*Opinion, Filed November 21, 1963, Denying Defendants'
Motion on Arrest of Judgment, or for New Trial*

descriptions leave nothing to the imagination, and in detail, in a clearly prurient manner offend, degrade and sicken anyone however healthy his mind was before exposure to this material. It is a gross shock to the mind and chore to read. Pruriency and disgust coalesce here creating a perfect example of hardcore pornography.

CONCLUSION

Defendants place great weight on the requirement of the definition of obscenity, as they see it, which protects works which do not exceed contemporary community standards of candor in expression. There is no question that all three of the indicted materials exceed this standard. Certain materials sold openly on local newsstands were submitted to show what the acceptable limits of candor are today. Without so deciding, it may well be that these materials exceed the contemporary standard themselves. At any rate, supplying this Court with such materials does not provide conclusive evidence of the standard set by the community as a whole. Doubtless but a sliver of the community reads such things and there is no doubt the community as a whole does not necessarily tolerate them. For all the Court knows, local action before this and in the future will result in the removal of this type of material from the newsstands. This Court has the power and the right as a fact finder and as one who is aware of all types of material sold, tolerated and not tolerated by the community as a whole, to find, as it has found, that the material in question exceeds the standard. It does so unequivocally.

We have been regaled with the theory that the susceptibility of no single segment of the community is to be the paramount consideration in deciding whether a work is obscene. *Manual Enterprises v. Day*, supra. This is the law and we do not argue with it. It is also the law that the community as a whole is the proper consideration. In this

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community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. *Roth v. California, supra*. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected.

There must come a time when the law must take a stand and determine what is legally obscene. It is all a matter of degree. Each publication is to be judged by itself, cover to cover, and as a whole. It is not merely a matter of four letter words, or the quantity of them. It is a matter of our concept of obscenity as defined and limited by the United States Supreme Court.

**Order, Dated November 21, 1963, Denying
Defendants' Motion in Arrest of Judgment,
or for New Trial**

AND NOW, this twenty-first day of November, 1963, in accordance with the foregoing opinion, IT IS ORDERED that the motions of defendants in Arrest of Judgment and, in the alternative, for a New Trial, be and the same are hereby DENIED.

IT IS FURTHER ORDERED that the defendants are called for sentence on November 27, 1963 at 10:00 A. M. in a courtroom of the United States District Court for the Eastern District of Pennsylvania.

/s/ RALPH C. BODY,
J.

**Excerpts from Transcript of Proceedings of
December 19, 1963**

* * *

[14] The Court: Does the United States Attorney have anything to say?

Mr. Creamer: Yes, thank you, Your Honor.

May it please the Court, we have come to the end of a long reign of technicalities. Mr. Ginzburg has been convicted on 28 counts of sending obscene material through the mail.

Mr. Dickstein seems to feel that since Mr. Ginzburg did not operate out of a backroom somewhere and push these publications furtively that therefore his crime is not a heinous one, not a very severe one, hardly meets the statute, but I call to Your Honor's attention the fact that Title 18 United States Code, Section 1461, contains no provision that distribution of obscene material must be done furtively. As a matter of fact, to fit Mr. Ginzburg's [15] plan the last thing in the world that he would want to do would be to distribute this material furtively, and I say that because Mr. Ginzburg's plan which Your Honor has pronounced in your opinion after trial was quite clear to get the widest distribution and greatest circulation that he could, because it is clear from the trial and the case itself that this was a commercial venture. I am amazed that Mr. Dickstein would place Mr. Ginzburg in the role of a crusader for freedom when Eros was selling for approximately \$25 a year for a subscription; Liaison, \$18 a year; and The Housewife's Handbook for \$4.95. I think that Your Honor realizes and knows from the full trial that was held in this case that this was a commercial venture, that this was a gigantic widescale pandering to the public in an attempt to distribute and disseminate this material.

Mr. Dickstein seeks refuge in the fact that Maxine Serett did in fact distribute through the mails without

*Excerpts from Transcript of Proceedings of
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post office interference many copies of The Housewife's Handbook on Selective Promiscuity before in effect Mr. Ginzburg acquired the franchise to distribute it on the grand scale. I submit to Your Honor that Maxine Serett was distributing these books or this Housewife's Handbook only to physicians; she never had widespread, indiscriminate distribution of the Handbook, and, consequently, the Post [16] Office Department did not interfere with her distribution of the publication. If Mr. Ginzburg had distributed and sold and advertised these books solely to the 1700 physicians which Mr. Dickstein mentions, we, of course, would not be here this morning with regard to The Housewife's Handbook on Selective Promiscuity.

Speaking in regard to Liaison I think Your Honor will recall that even their own experts indicated that this had no literary merit certainly and was completely valueless in the literary field. Mr. Dickstein has mentioned that there were six issues of Liaison before the prosecution and that only prosecution was on the first issue or Mr. Darr's issue. Of course, I call the Court's attention that Mr. Ginzburg and his attorney have stipulated that Mr. Ginzburg sent the first edition of Liaison through the mails knowing the contents fully thereof and then I would further call to Your Honor's attention that many of the articles, at least a half dozen that appeared at subsequent times, in subsequent issues of Liaison, were written by Mr. Darr.

Finally, we reach the Eros publication or what Mr. Ginzburg created as pornography for snobs, that is, by embracing it in an aura of respectability, by disguising it with a pseudo-art and pseudo-intellectualism, he attempted to pander it to the largest group he could find but, [17] of course, he wanted the upper income group so that they could afford the rich paper and the fine backing of the publication.

Finally, Your Honor, I would submit that this case was fully and fairly tried, that Mr. Ginzburg is certainly not a

*Excerpts from Transcript of Proceedings of
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crusader for freedom, that he is one who walked the narrow margin, as close as he could to the precipice, thinking they will never get him on an obscenity charge because he has insulated himself so much with works of art and things of that nature. I think that it is quite clear from the trial of this case that he knew exactly what he was doing all the time, and at this time I would like to call upon the United States Attorney to make some further comments.

Thank you, Your Honor.

The Court: Mr. O'Keefe, you may address the Court.

Mr. O'Keefe: Thank you, Your Honor.

If Your Honor please, as you know it is not very often that I come down to the court at the time of sentencing because I think my staff are capable of handling the matters that they have tried before this and the other judges in the district, and I would like to comment and say at this time that Mr. Creamer in my opinion did a marvelous job in this case, but I feel it incumbent upon me because [18] of the nature of this case to stand before the Court today at the time of sentencing.

If I were to listen to counsel for the defendant, as he said, this is not an ordinary man, an ordinary defendant that is standing here before this Court today. I agree with him; he is not an ordinary man, he is not as bad as the rest of them. In my opinion he is worse and that's why I am here.

This case is not a case that reaches just into the Eastern District of Pennsylvania. This is a case that reaches throughout the United States, and it is an important case to the Department of Justice, to the Attorney General and in my opinion to every citizen in the United States, and that again is why I am standing here.

Listening again to counsel for defendant I thought he was going to mention among those who agreed with Mr. Ginzburg Drew O'Keefe and Shane Creamer pretty soon, but that's not the point. This man has been tried. He has

*Excerpts from Transcript of Proceedings of
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been tried fairly. He has been convicted and he is here to be sentenced, and I ask this Court who is very familiar with this case to give this man the most substantial sentence you possibly can under all of the circumstances.

Thank you, Your Honor.

[19] The Court: Mr. Shapiro, would you like to say anything?

Mr. Shapiro: No, thank you, Your Honor.

The Court: Would you like to say anything more, Mr. Dickstein?

Mr. Dickstein: No, Your Honor.

The Court: The defendant may address the Court.

Defendant Ginzburg: I think my attorney has expressed—

The Court: I can't hear you, sir.

Defendant Ginzburg: I think my attorney has expressed my messages, thank you.

The Court: You have nothing you would like to add?

Defendant Ginzburg: No, sir, thank you.

The Court: It is my recollection among other matters and testimony that—I have forgotten how many Handbooks were mailed; it was agreed and stipulated to by the defense and the prosecution—but I have a recollection that there were over six million advertising circulars sent out from Middlesex, New Jersey, advertising the various items that we are concerned with here.

Mr. Dickstein: These were mailing pieces [20] for Eros subscriptions.

The Court: Mailing subscriptions for Eros alone? I didn't know whether it was Eros and The Handbook or just The Handbook, but I am talking about the testimony. I don't have the testimony here this morning but I think there is little further I need say. I have said everything that I care to say in regard to the offenses committed by the defendants in the opinion which was filed some months ago. I will now sentence the defendant.

*Excerpts from Transcript of Proceedings of
December 19, 1963*

In the matter of the United States of America vs. Ralph Ginzburg, Documentary Books, Inc., Eros Magazine, Inc., and Liaison News Letter, Inc., Criminal Case No. 21367, the sentence of the Court is as follows:

As to Count No. 1, the sentence of the Court is that Ralph Ginzburg pay a fine of \$1000 and the corporate defendant, which I believe is—

Mr. Creamer: Documentary Books.

The Court: —Documentary Books, a fine of \$500.

As to Count No. 2, the defendant is sentenced to pay a fine of \$1000 and Documentary Books, Inc., a fine of \$500.

As to Count No. 3, a fine of \$1000 as to Ralph Ginzburg, and \$500 as to the corporate defendant, [21] Documentary Books.

As to Count No. 4—

Mr. Creamer: Liaison.

The Court: As to Count No. 4, a fine as to Ralph Ginzburg—the fine is \$1000 as to Ralph Ginzburg—and \$500 as to the corporate defendant, Liaison.

As to Count No. 5, the fine is \$1000 as to Ralph Ginzburg and \$500 as to the corporate defendant, Liaison News Letter.

As to Count No. 6, the fine is \$1000 as to Ralph Ginzburg and \$500 as to the corporate defendant, Liaison News Letter.

As to Count No. 7 which concerns Eros the fine is \$1000 as to Ralph Ginzburg and \$500 as to Eros Magazine, Inc.

As to Count No. 8, the fine is \$1000 as to Ralph Ginzburg and \$500 as to Eros Magazine, Inc.

As to Count No. 9, the fine is \$1000 as to Ralph Ginzburg and \$500 as to Eros Magazine, Inc.

As to Count No. 10, the fine is \$1000 as to Ralph Ginzburg and \$500 as to Eros Magazine, Inc.

As to Count No. 11, which concerns The Handbook, the sentence of the Court is imprisonment for three years [22]

*Excerpts from Transcript of Proceedings of
December 19, 1963*

as to Ralph Ginzburg and \$1000 fine, and as to Documentary Books, Inc., a fine of \$500, and in like manner, Counts 12, 13, 14, and 15, there will be the same sentence.

Count No. 12, imprisonment for three years, fine of \$1000 as to Ralph Ginzburg, and a \$500 fine as to Documentary Books.

As to Count No. 13, imprisonment for three years, a \$1000 fine as to Ralph Ginzburg, and \$500 as to Documentary Books, Inc.

Count No. 14, imprisonment for three years, a \$1000 fine as to Ralph Ginzburg, and \$500 fine as to Documentary Books.

As to Count No. 15, three years imprisonment, a \$1000 fine as to Ralph Ginzburg, and \$500 fine as to Documentary Books.

As to Count No. 16, imprisonment for three years and a \$1000 fine as to Ralph Ginzburg, and a \$500 fine as to Documentary Books.

The imprisonment imposed on Counts 11, 12, 13, 14, 15, and 16 shall run concurrently and not consecutively.

As to Count No. 17 which concerns the Eros Magazine the sentence of the Court is imprisonment for two years and a \$1000 fine as to Ralph Ginzburg, and a \$500 fine as to Eros Magazine, Inc.

[23] As to Count No. 18, two years imprisonment, a \$1000 fine as to Ralph Ginzburg, and \$500 fine as to Eros Magazine, Inc.

As to Count No. 19, two years imprisonment, a \$1000 fine as to Ralph Ginzburg, and \$500 fine as to Eros Magazine, Inc.

Count No. 20, two years imprisonment and a \$1000 fine as to Ralph Ginzburg, and a \$500 fine as to Eros Magazine, Inc.

Count No. 21, imprisonment for two years, a \$1000 fine as to Ralph Ginzburg, and \$500 as to Eros Magazine, Inc.

*Excerpts from Transcript of Proceedings of
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As to Count No. 22, imprisonment for two years, a \$1000 fine as to Ralph Ginzburg, and a \$500 fine as to Eros Magazine, Inc.

The sentences of imprisonment concerning Counts 17, 18, 19, 20, 21 and 22 shall run concurrently and not consecutively.

As to Count 23 which concerns—

Mr. Creamer: Liaison, Your Honor.

The Court: This is Count 23 which concerns Liaison. The sentence as to Ralph Ginzburg is a \$1000 fine and \$500 as to Liaison News Letter, Inc.

As to Count 24, the sentence of the Court is [24] a \$1000 fine as to Ralph Ginzburg and \$500 as to Liaison News Letter, Inc.

As to Count 25, the sentence of the Court is to pay a fine of \$1000 as to Ralph Ginzburg and \$500 as to Liaison News Letter, Inc.

As to Count 26, the sentence of the Court is a fine of \$1000 as to Ralph Ginzburg and \$500 fine as to Liaison News Letter, Inc.

As to Count 27, the sentence of the Court is a fine of \$1000 as to Ralph Ginzburg and \$500 as to Liaison News Letter, Inc.

As to Count 28 and the last count, the sentence of the Court is a \$1000 fine as to Ralph Ginzburg and \$500 as to Liaison News Letter, Inc.

That is the sentence. You have a complete record.

Are there any questions by the clerk?

Mr. Creamer: If Your Honor please, just for clarification, were the sentences on Counts 11 through 16 to run concurrently with Counts 17 through 22, or consecutively?

The Court: No.

Mr. Creamer: Consecutively?

The Court: As to Counts 11 to 16, they will run concurrently. That will be three years.

*Judgment as to Defendant, Ralph Ginzburg
December 19, 1963*

[25] Mr. Creamer: Yes, sir.

The Court: Counts 17 to 22 which concern Eros—

Mr. Creamer: Eros.

The Court: —that's two years concurrently which will be two more or a total sentence of five years.

Mr. Creamer: Then the three-year sentences on Counts 11 through 16 will be followed consecutively by the two-year sentences on Counts 17 through 22?

The Court: That's right.

* * *

**Judgment as to Defendant, Ralph Ginzburg
December 19, 1963**

On this 19th day of December, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty as to each of Counts 1 to 28, inclusive of the offense of Use of the mails for the mailing of non-mailable matter, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years on each of Counts 11 to 16, said sentences of imprisonment to run concurrently. On each of Counts 17 to 22, inclusive, Imprisonment for Two (2) Years, said sen-

Judgment as to Defendant, Documentary Books, Inc.

tences of imprisonment to run concurrently with each other and consecutively with the sentence imposed on each of the Counts 11 to 16, inclusive.

IT IS ADJUDGED that the Defendant pay to the United States a fine of One Thousand (\$1,000.00) Dollars on each of Counts 1 to 28, inclusive.—(Total fine \$28,000.00) (Total imprisonment Five years).

IT IS FURTHER ORDERED that the execution of said sentence be stayed pending appeal. Bail to be entered in the amount of \$10,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

RALPH C. BODY,
United States District Judge.

Judgment as to Defendant, Documentary Books, Inc.

On this 19th day of December, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty as to each of Counts 1 to 3 and 11 to 16, inclusive of the offense of Use of the mails for the mailing of a non-mailable matter, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Judgment as to Defendant, Eros Magazine, Inc.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay to the United States a fine of Five Hundred (\$500.00) Dollars on each of Counts 1 to 3, inclusive and 11 to 16, inclusive. (Total fine \$4,500.00.)

IT IS FURTHER ORDERED that the execution of said sentence be stayed pending appeal.

RALPH C. BODY,
United States District Judge.

Judgment as to Defendant, Eros Magazine, Inc.

On this 19th day of December, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty as to each of Cts. 7 to 10, incl. & 17 to 22, incl., of the offense of Use of the mails for the mailing of non-mailable matter, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay to the United States a fine of Five Hundred (\$500.00) Dollars on each of Counts 7 to 10, inclusive and 17 to 22, inclusive. (Total Fine \$5,000.00.)

Judgment as to Defendant, Liaison News Letter, Inc.

IT IS FURTHER ORDERED that the execution of said sentence be stayed pending appeal.

RALPH C. BODY,
United States District Judge.

Judgment as to Defendant, Liaison News Letter, Inc.

On this 19th day of December, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty as to each of Counts 4 to 6 and 23 to 28, inclusive of the offense of Use of the mails for the mailing of non-mailable matter, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay to the United States a fine of Five Hundred (\$500.00) Dollars on each of Counts 4 to 6, inclusive and 23 to 28 inclusive. (Total fine \$4500.00.)

IT IS FURTHER ORDERED that the execution of said sentence be stayed pending appeal.

RALPH C. BODY,
United States District Judge.

Notice of Appeal

Names and addresses of appellants:

RALPH GINZBURG,
Documentary Books, Inc.,
Eros Magazine, Inc.
Liaison News Letter, Inc.
110 West 40th Street,
New York, N. Y.

Names and addresses of appellants' attorneys:

NORMAN A. OSHTRY,
20 South 15th Street,
Philadelphia, Pennsylvania

DAVID I. SHAPIRO and SIDNEY DICKSTEIN,
1411 K Street, N.W.
Washington, D. C.

Offense: Violations of 18 U. S. C. § 1461.

Judgment appealed from: The judgment of the United States District Court for the Eastern District of Pennsylvania, Body, J., made and entered December 19, 1963, as follows:

1. Count I— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00;
Defendant, Documentary Books, Inc., sentenced to pay a fine of \$500.00.
2. Count II— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00;
Defendant, Documentary Books, Inc., sentenced to pay a fine of \$500.00.

Notice of Appeal

3. Count III— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant, Documentary Books, Inc., sentenced to pay a fine of \$500.00.
4. Count IV— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison News Letter, Inc., sentenced to pay a fine of \$500.00.
5. Count V— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison News Letter, sentenced to pay a fine of \$500.00.
6. Count VI— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison News Letter, Inc., sentenced to pay a fine of \$500.00.
7. Count VII— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Eros Magazine, Inc., sentenced to pay a fine of \$500.00.
8. Count VIII— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Eros Magazine, Inc., sentenced to pay a fine of \$500.00.
9. Count IX Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Eros Magazine, Inc., sentenced to pay a fine of \$500.00.

Notice of Appeal

10. Count X— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Eros Magazine, Inc., sentenced to pay a fine of \$500.00.
11. Count XI— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.
12. Count XII— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.
13. Count XIII— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.
14. Count XIV— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.
15. Count XV— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.
16. Count XVI— Defendant, Ralph Ginzburg, sentenced to three (3) years imprisonment and a fine of \$1,000.00; Defendant Documentary Books, Inc.; sentenced to pay a fine of \$500.00.

Notice of Appeal

17. Count XVII— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
18. Count XVIII— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
19. Count XVIII— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
20. Count XX— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
21. Count XXI— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
22. Count XXII— Defendant, Ralph Ginzburg, sentenced to two (2) years imprisonment and a fine of \$1,000.00; Defendant Eros Magazine, Inc.; sentenced to pay a fine of \$500.00.
23. Count XXIII— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.

Notice of Appeal

24. Count XXIV— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.
25. Count XXV— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.
26. Count XXVI— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.
27. Count XXVII— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.
28. Count XXVIII— Defendant, Ralph Ginzburg, sentenced to pay a fine of \$1,000.00; Defendant Liaison Newsletter Inc., sentenced to pay a fine of \$500.00.

Count XI through Count XVI imprisonment sentences to run concurrently.

Count XVII through Count XXII imprisonment sentences to run concurrently, but consecutively to Counts XI through Count XVI.

The above-named appellants hereby appeal to the United States Court of Appeals for the Third Circuit from the above stated judgment.

Dated: December 19, 1963.

s/ NORMAN A. OSHTRY,
Attorney for Appellants.

[fol. 385]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14742, 14743, 14744 and 14745

UNITED STATES OF AMERICA,

v.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC. and LIAISON NEWS LETTER, INC., Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued June 16, 1964

Before :

McLAUGHLIN, KALODNER and STALEY, *Circuit Judges*.

OPINION OF THE COURT—Filed November 6, 1964

By McLAUGHLIN, *Circuit Judge*.

Appellants were convicted of violating the federal obscenity law, 8 U.S.C. § 1461. All three publications involved were found to be obscene under the statute. The record shows that in September, 1962, appellant Eros Magazine, Inc. of which appellant Ginzburg was editor and publisher, after a great deal of deliberation endeavored to obtain what was considered advantageous mailing privileges from Blue Ball, Pennsylvania. Meeting with no success there, a similar try was made with the Post Office at Intercourse, Pennsylvania. Again rejected, a [fol. 386] final successful effort was made at the Middlesex, New Jersey Post Office from which over five million advertisements of Eros were mailed. It is not disputed

that the bulk of the mailings for the three publications was from Middlesex. In the advertisements above mentioned, inter alia, appeared the following:

"The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions * * * to be published."

The magazine Eros was thereafter mailed out from Middlesex. It is with Volume 1, No. 4, 1962 thereof that we are concerned. Eros is a quarterly. Its price is \$25. a year.

The second publication was mailed in November, 1962. It was a book which had been originally titled by its author "The Housewife's Handbook for Promiscuity". That book so titled had been sold by mail to a selected list by the author. The title was later changed to read "Housewife's Handbook on Selective Promiscuity". The mailing in this instance was under the latter title. Its price is \$4.95.

The third publication is a biweekly newsletter called Liaison. According to the witness Darr who was hired by appellant Ginzburg as editor of Liaison, Ginzburg told him that " * * * Liaison was to cover the same scope [as Eros], in a more newsworthy fashion." Darr was hired after he had specially written and submitted a piece titled "How to Run a Successful Orgy". Ginzburg telephoned him and asked him "When can you start to work?" The particular piece in revised form was published in Liaison. The price of Liaison was \$15, later reduced to \$4.95.

The advertising material, concededly not obscene of itself, was admittedly mailed by appellants on the specified dates with full knowledge of its contents.

The case was tried to the court, a jury trial having been waived by appellants. The trial consumed five days. [fol. 387] Appellants were found guilty on all counts on June 14, 1963. Later, at the request of the appellants, on August 6, 1963, the court filed special detailed findings of fact. Summing up those findings, the court said:

"In conclusion, after a thorough reading and review of all the indicted materials, this Court finds that said materials are compilations of sordid narrations dealing with sex, in each case in a manner designed to appeal to prurient interests. They are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake."

We have read, examined and considered the publications involved in this appeal, " * * * in the light of the record made in the trial court, * * * ." *Jacobellis v. Ohio*, — U.S. — (P. 11, slip op.) (1964). The only important question before us is whether the publications are obscene under the federal statute. Since this calls for a constitutional judgment it is our duty to decide it. Under the obscenity tests laid down by the Supreme Court, the Constitutional status of the publications " * * * must be determined on the basis of a national standard." *Jacobellis*, supra, p. 10, slip op. This is peculiarly fitting here where over five million advertisements for the Eros material were mailed out to prospects in this country.

Also we have very much in mind that as the Supreme Court stated in *Roth v. United States*, 354 U.S. 484 (1957):

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the [fol. 388] history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The Court went on to say, p. 487, that " * * * sex and obscenity are not synonymous" and ruled on p. 487 that

"Obscene material is material which deals with sex in a manner appealing to prurient interest." It quoted with approval the American Law Institute, Model Penal Code, proposed official draft (May 4, 1962), § 251.41(1):

" * * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters * * * ."

The same necessary quality named in *Roth*, *supra*, and *Jacobellis*, *supra*, as affronting current national community standards is described in *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962) as "'patent offensiveness' or 'indecenty'". At pages 483, 484, the *Day* opinion, speaking of the federal obscenity law, notes that " * * * the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. * * * the statute reaches only indecent materials which, as now expressed in *Roth v. United States*, *supra*, at 489, 'taken as a whole appeals to prurient interest'."

This brings us to the special circumstances revealed in the present appeal. We are not dealing with a novel by a well known novelist, written as and for a work of fiction with a firm base of opposition to well defined then existing social conditions, which was held mailable because its " * * * predominant appeal * * * [was] demonstrably not to 'prurient interest'." *Grove Press v. Christenberry*, 276 F.2d 433, 437 (2 Cir. 1960). Nor have we in this appeal anything comparable to the autobiographical [fol. 389] account of the scabrous life of a writer of some pretensions, where numerous revolting episodes were part of a text which the Supreme Court of Massachusetts (184 N.E.2d 328, 334 (1962)) accepted " * * * as a conscious effort to create a work of literary art."

What confronts us is a *sui generis* operation on the part of experts in the shoddy business of pandering to

and exploiting for money one of the great weaknesses of human being. Appellants' fundamental objective obviously was and is to, more or less openly, force their invitations to obscenity upon the American public through the United States mails. They did this in reliance on their own ill conceived theory that all barriers to obscenity have in effect been removed. They were not concerned with trying to circulate authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of a work, whatever art form it may be. Eros was declared as avowedly concerned with one thing, what in the prospectus is described as "erotica" and *which, it is stated, has been enabled to be published "by recent court decisions."* (Emphasis supplied). An undeniable example of what was meant by erotica is the content of Eros, Vol. 1, No. 4.

Seemingly to soften their approach and to pick up whatever support that might be available, appellants offer separate defenses for each of the publications. For Eros it is claimed in the brief that it "has redeeming social importance with respect to literary and artistic values". Having in mind the above proclaimed objective, even a casual reading makes it readily apparent that bits of non-statutory material have simply been laced into the obscene structure which is the Eros volume in evidence with the intent of creating that impression. This seems to us not just frivolous but a bold attempt to pioneer both in the elimination of the law itself and in the collection of the resultant profits. We have not seen nor been referred to any decision which countenances that sort of brazen [fol. 390] chicanery. If permitted, it would stultify the carefully wrought formula whereby the basic law guarding the national community from obscenity is upheld but not at the expense of honest ideas founded on at least some social importance even if it be but the slightest.

From our own close reading and scrutiny of Eros, its basic material predominantly appeals to prurient interest; it is on its face offensive to present day national com-

munity standards, and it has no artistic or social value. The sham device of seeking to somewhat cloak the content with non-offensive items falls of its own evil weight. Cf. *Kahm v. United States*, 300 F.2d 78 (5 Cir. 1962).

It is asserted that the Handbook has some social-scientific importance. Testimony along that line was expressly disbelieved by the trial judge. Our own reading and examination of this work leads us to the same conclusion. The original title to the book gives its real purpose. That title, "The Housewife's Handbook for Promiscuity" is a fitting capsule description of the content. The mere change in the title, making it sound like some sort of a text book or tract, shows the arrogant insistence of these appellants that raw obscenity is at this time properly an element of national community life. There is nothing of any social importance in the Handbook. It is patently offensive to current national community standards. Applying those standards to the average person its dominant theme as a whole appeals to prurient interest.

Appellants would have it that the book fits into the same category as "Fanny Hill", found not obscene by the New York Court of Appeals in *Larkin, et al. v. G. P. Putnam*, — N.Y.2d — (opinion filed July 10, 1964). Whatever may eventually be the outcome of that litigation, it has no bearing on this appeal for, inter alia, it was there specifically held as to the book that "It has a slight literary value and it affords some insight into the life and manners of mid-18th Century London."

[fol. 391] It is argued that *Liaison*, the newsletter, is without the statute, on the ground that it does not appeal to prurient interest. As we have seen, according to Ginzburg, the directing head of all three publications, the purpose of *Liaison* was to cover the same scope as *Eros*, in a more newsworthy fashion. Our study of it bears this out. Its material openly offends current national community standards in much the same fashion as does *Eros*. Taken as a whole, its appeal is directed to the prurient interest of the average person in the national community. The type

of thing that it is, as visualized from the test given the successful candidate for its editor, is confirmed by the material printed in it. There is no pretension that it has any social significance or literary merit.

There is defense testimony which would have it that all three publications are not within the reach of the statute. The trier of the facts was not persuaded by it nor are we.

Finding, as we do, that *Eros*, the *Handbook* and *Liaison* are obscene, affirmance of the convictions on the advertising counts follows as of course.

The contentions of appellants that the convictions on the *Eros* and *Liaison* counts must be reversed because the trial court failed to find those publications guilty within the statute are without merit. This is clear as to *Eros* in the Special Findings of Fact, Nos. 16, 17, 18, 19, the concluding paragraph of the Findings above quoted and also, though it is not necessary, in the court's opinion under the caption "*Eros* Vol. 1, Number 4, 1962." The *Liaison* Findings, which fully substantiate conviction on those counts, are Numbers 11, 12, 13, 14, 15, the concluding paragraph of the Findings and also, though it is not necessary, the court's opinion under the caption "*Liaison* Vol. 1, No. 1."

There is no substance to the complaint regarding the time of filing of the Special Findings of Fact. Rule of Criminal Procedure 23(a) provides that: "In a case tried [fol. 392] without a jury the court shall make a general finding and shall in addition on request find the facts specially."

The trial court's comment in its opinion on this point which is in strict accord with the record, is as follows:

"During the trial the Court made it clear to counsel on more than one occasion that the entry of special findings would be delayed beyond the entry of a general finding if a general finding of guilty was to be entered on any of the counts. There were no objections by defendants' counsel to this proposed pro-

cedure. Thus, any objection to the delayed entry of special findings was waived by silence on the record. Likewise after verdict was rendered by the Court, no objections were stated for the record at that time.

"On the merits, this was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. This is the nature of the case. It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer. Defendants were not precluded from submitting findings but apparently chose not to do so. We find no merit in this issue raised by them, apparently as an afterthought."

Under the facts the findings were filed promptly and properly within the above rule.

It is also asserted that the trial court converted evidence of criminal intent admissible against one defendant into proof of criminal intent on the part of all defendants. This concerns the two unsuccessful attempts to mail out [fol. 393] Eros advertising material. The successful mailings from Middlesex were for all three publications. The point is de minimis in any event. The stipulation between counsel for the parties and approved by the court states that the advertising material was mailed by the defendants on the occasions alleged in the indictments with full knowledge of the contents thereof. We do not find the slightest indication of any substantial confusion on the part of the trial judge with reference to the attempted mailings and mailings of the material involved in the appeal.

Appellants object to the admission of the rebuttal testimony of Government witness, Dr. Frignito. This testimony

was rightfully presented and received as rebuttal evidence. The witness' complete answer as to the effect of the Handbook makes it evident that he was considering the book's effect on the entire community, not some group thereof. We find no error in this connection.

Appellants claim error because at the time of the defense motions for dismissal of the indictment and for acquittal at the end of the Government's case, the trial judge who had read the indictment, as he says in his opinion, had not read at that time " * * * each and every word or sentence of each of the indicted materials * * *" but, as he further said, " * * * the Court read enough of the indicted materials to be able to rule as a matter of law that the Government had made out a prima facie case." There is no prejudicial error in this incident.

Finally, appellants urge that the court erred in striking the affidavit and exhibits in support of the defense motion to dismiss the indictment. The defense on that motion was correctly limited by the court to the face of the indictment and whether it accurately charged the named offenses and gave adequate notification thereof to the defendants. The defense attempted by the affidavit and letters to put before the court in ex parte form, opinions from various sources favorable to the Handbook. These were trial matters and so held by the judge.

[fol. 394] The district judge was acutely aware of the issue of constitutional law raised in this action. He was conversant with the Supreme Court's views on the federal obscenity statute and was guided accordingly. Our study of the record, including the transcript and convicted materials, establishes that he tried it fairly, carefully and competently. He made no substantial errors of law. We are convinced that, under the evidence, he was justified in finding the defendants guilty on all counts. As we have indicated, we have independently arrived at that same conclusion.

The judgments of the district court will be affirmed.

[File endorsement omitted]

[fol. 395]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14742

UNITED STATES OF AMERICA,

vs.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

RALPH GINZBURG, Appellant.

On appeal from the United States District Court for the
Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Staley, *Circuit
Judges.*

JUDGMENT—November 6, 1964

This cause came on to be heard on the record from the
United States District Court for the Eastern District of
Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and
adjudged by this Court that the judgment of December 19,
1963 of the said District Court in this case be, and the
same is hereby affirmed.

[File endorsement omitted]

[fol. 396]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14,743

UNITED STATES OF AMERICA,

vs.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
DOCUMENTARY BOOKS, INC., Appellant.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

JUDGMENT—November 6, 1964

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of December 19, 1963 of the said District Court in this case be, and the same is hereby affirmed.

[File endorsement omitted]

[fol. 397]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14,744

UNITED STATES OF AMERICA,

vs.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
EROS MAGAZINE, INC., Appellant.

On appeal from the United States District Court for the
Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Staley, *Circuit
Judges*.

JUDGMENT—November 6, 1964

This cause came on to be heard on the record from the
United States District Court for the Eastern District of
Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and
adjudged by this Court that the judgment of December 19,
1963 of the said District Court in this case be, and the
same is hereby affirmed.

[File endorsement omitted]

[fol. 398]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14,745

UNITED STATES OF AMERICA,
vs.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
LIAISON NEWS LETTER, INC., Appellant.

On appeal from the United States District Court for the
Eastern District of Pennsylvania.

Present: McLaughlin, Kalodner and Staley, *Circuit
Judges.*

JUDGMENT—November 6, 1964

This cause came on to be heard on the record from the
United States District Court for the Eastern District of
Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and
adjudged by this Court that the judgment of December 19,
1963 of the said District Court in this case be, and the
same is hereby affirmed.

[File endorsement omitted]

[fol. 399]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 14742 to 14745 inc.

UNITED STATES OF AMERICA,
vs.

RALPH GINZBURG, et al.,
Ralph Ginzburg, appellant in #14742,
Documentary Books, Inc., appellant in #14743,
Eros Magazine, Inc., appellant in #14744,
Liaison News Letter, Inc., appellant in #14745.

Present: McLaughlin, Kalodner and Staley, *Circuit Judges*.

ORDER STAYING MANDATES—November 17, 1964

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until December 7, 1964.

By the Court, McLaughlin, Circuit Judge.

[File endorsement omitted]

[fol. 400] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 401]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1964

RALPH GINZBURG, et al., Petitioners,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—November 27, 1964

Upon Consideration of the application of counsel for
petitioner(s),

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including January 5, 1965.

William J. Brennan, Jr., Associate Justice of the
Supreme Court of the United States.

Dated this 27th day of November, 1964.

[fol. 402]

SUPREME COURT OF THE UNITED STATES

No. 807, October Term, 1964

RALPH GINZBURG, et al., Petitioners,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 5, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.

FILED

JAN 4 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No.



42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

*To the Honorable the Chief Justice of the United
States and the Associate Justices of the Supreme
Court of the United States:*

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgments of that court entered November 6, 1964, affirming petitioners' convictions for mailing obscene material under 18 U.S.C. § 1461. Petitioner Ginzburg was fined \$28,000 and sentenced to five years imprisonment. The corporate petitioners were fined a total of \$14,000 (JA 376-379).¹

¹ The letters "JA" refer to the Joint Appendix printed for the use of the court below.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported but is set out in Appendix "A", *infra*, pp. 1a-10a. The opinion of the District Court (JA 354-368) is reported at 224 F. Supp. 129.

JURISDICTION

The judgments of the court below were entered on November 6, 1964. On November 27, 1964, Mr. Justice Brennan granted an extension of time to file this petition to January 5, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1(a). Does the Federal obscenity statute, 18 U.S.C. § 1461, prohibit the mailing of a literary work dealing with love and sex which the Government concedes is not "hard-core" pornography?

(b). If so, does the Federal obscenity statute violate the First Amendment's guarantee of freedom of press and expression?

(c). Is the Federal obscenity statute unconstitutionally vague and uncertain even when limited to "hard-core" pornography?

2(a). Where a literary work is devoid of material which is erotically stimulating to the average person, can that work "appeal to prurient interest"?

(b). Where portions of a literary work are erotically stimulating to the average person, but the work does not induce in such person morbid or shameful sexual desires, can that work "appeal to prurient interest"?

3. Can a conviction under 18 U.S.C. § 1461 be sustained where the literary materials found to be "obscene" are less offensive in their description or representation of sex than other literary materials in widespread current circulation?

4(a). When a literary work dealing with sex advocates ideas, can it be deprived of First Amendment protection because experts disagree as to its "usefulness"?

(b). When substantial portions of a literary work are of uncontroverted social importance, can it be deprived of First Amendment protection because the trier of fact believes that other portions are obscene?

5. In determining whether material is obscene, can the trial court receive and consider testimony of the effect of such material on adolescents?

6(a). Where four defendants are jointly indicted and tried for non-related obscenity offenses and evidence of one defendant's alleged intent to appeal to prurient interest is used to support conviction of all defendants on the theory that they engaged in a "general scheme and purpose" to commercially exploit obscenity, may the appellate court disregard the erroneous transfer of such intent and affirm all four convictions on the theory that each defendant knew the contents of the mailed material?

(b). Is the fact that a defendant commercially exploits a literary work for a profit a relevant consideration in determining whether that work is "obscene" under 18 U.S.C. § 1461?

7(a). Where defendants make a timely request for special findings of fact under Rule 23(c) of the Fed-

eral Rules of Criminal Procedure, may the trial court enter a general finding of "guilty on all counts", instruct the prosecutor to prepare special findings, and adopt the prosecutor's findings (proposed *ex parte*) fifty-four days after finding defendants guilty?

(b). Where, in making findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure, the trial court fails to find essential elements of the crime, may the court of appeals supply the missing findings by inferring their existence from other findings and from the trial court's opinion?

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Constitutional provisions involved are the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statute involved is 18 U.S.C. § 1461. The rule involved is Rule 23(c) of the Federal Rules of Criminal Procedure. Pertinent portions of the constitutional provisions, statute, and rule are set forth in Appendix "B", *infra*.

STATEMENT OF THE CASE

A. PROCEEDINGS BEFORE TRIAL

On March 15, 1963, the Grand Jury returned a twenty-eight count indictment charging petitioners with eighteen counts of mailing obscene publications and ten counts of mailing advertisements for these publications in violation of 18 U.S.C. § 1461 (JA 6-13). The alleged obscene publications were *Eros*, Vol. 1, No. 4 ("Eros"), *The Housewife's Handbook on Selective Promiscuity* ("The Handbook"), and *Liaison*, Vol. 1, No. 1 ("Liaison"). Before trial, the par-

ties stipulated, *inter alia*, that (1) petitioners mailed the challenged publications knowing the contents thereof and (2) the indictment charged that Eros, the Hand-book, and Liaison were each "obscene when considered as a whole" (JA 148-150). The trial began on June 10, 1963, before the District Court (Body, J.), sitting without a jury.²

B. THE TRIAL

1. The Government's Evidence

After petitioners' stipulations acknowledging mailing of the three works with knowledge of their contents had been placed on the record (JA 149-150, 152), the Government called the postmaster of Blue Ball, Pennsylvania (JA 152). This witness testified, over objection (JA 154-155), that on October 18, 1962, Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote him a letter stating that "[a]fter a great deal of deliberation, we have decided that it might be advantageous for our direct mailing to bear the post mark of your city" (Ex. G1, JA 155). The postmaster of Intercourse, Pennsylvania testified, over objection (JA 157), that she received a similar letter dated September 4, 1962, also signed by Frank Brady (Ex. G2, JA 157-158).

The postmaster of Middlesex, New Jersey, testified that each of the three corporate petitioners mailed their publications from his post office (JA 160-162) and that all of these mailings were handled by the General Mailing Corporation of Middlesex, a mail order house so large that it had a post office substation on its own premises (JA 162-164).

² A waiver of a jury trial was filed on June 10, 1964 (JA 2).

John Darr, a discharged employee of Liaison News Letter, Inc. (JA 173, 183), testified as to the authorship and makeup of Liaison (JA 178-183), after which the Government introduced into evidence the three challenged publications (JA 184-185, Exs. G16-G18). At this point, the Government rested (JA 185), and the court denied petitioners' motion for acquittal (JA 186).

2. Petitioners' Evidence

(a) Eros

Petitioners' first witness was Dr. Charles G. McCormick, an eminent clinical psychologist (JA 186-188).³ Dr. McCormick testified that although there were some passages in Eros that might be erotically stimulating (JA 212-214), those passages would not induce in the average person a morbid or unhealthy attitude toward sex (JA 214),⁴ and that the predominant effect of Eros would not be to stimulate in the average person any morbid or shameful sexual desires.

³ Dr. McCormick is certified by the States of New York and California, a member of the Editorial Board of the International Journal of Group Psychotherapy, a Fellow of the American Group Psychotherapy Association, a holder of a doctoral degree from Columbia University and for sixteen years a member of the teaching staff of the New York School of Social Work, a Columbia affiliate (JA 186-188).

⁴ Dr. McCormick began his testimony by describing pornographic material (JA 188-196). He explained that pornography produces in the average reader "both the sense of pleasure and the sense of guilt or shame" (JA 188). The witness testified that pornography is sexually stimulating to most people and that an absence of erotic response to such material would be symptomatic of physical or psychological illness (JA 193). Dr. McCormick described the difference between the average healthy male's response to pornography and his response to an attractive nude woman, testifying that in the latter case a healthy male would be erotically stimulated but without feelings of shame or guilt (JA 193-196). He then identified various books and pamphlets as pornography and this material was introduced in evidence (Exs. D1-D8, JA 196-199,

Dr. Peter G. Bennett, M.D., a practicing psychiatrist and teacher of psychiatry at the University of Pennsylvania Medical School (JA 256-257), testified that while the average person who read *Eros* might find some "occasional sexual stimulation" (JA 265), the predominant effect of *Eros* was *not* to create any morbid feelings of shame and guilt (JA 259-260, 264-265).⁵

Dwight Macdonald, the distinguished literary critic and commentator on American culture (JA 227-230), testified at length on the customary limits of candor with respect to descriptions and representations of sex (JA 230-235). According to Mr. Macdonald, *Eros* did not go substantially beyond those limits and, in fact, was considerably within them (JA 237-238). Mr. Macdonald also testified that a number of the articles in *Eros* were of considerable literary merit (JA 238-240).

Professor Horst Janson, Chairman of the Fine Arts Department of New York University, a recipient of two Guggenheim Fellowships, author of many articles

201). Dr. McCormick commented that the average person would be both revolted and sexually stimulated by reading those books and pamphlets (JA 202) and contrasted such material with "Lady Chatterley's Lover", stating that while both are sexually stimulating, the impact on the mind of the ordinary individual would be radically different. "[Lady Chatterley's Lover] will not be destroying, tearing, as this material will" (JA 203-204). The distinction, he pointed out, was that "hard-core" pornography, such as "The Autobiography of a Flea" (Ex. D7), engrossed the average reader in a sense of being both soiled and pleased (JA 205-206).

⁵ Dr. Bennett contrasted the effect of pornography on the average person, stating that it "is not simply an intense stimulation of erotic feelings. It includes this, of course, but erotic stimulation of itself is definitely not harmful or disturbing to the ordinary mature adult, whereas pornography has, always, in addition, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (JA 259-260).

and books on the history of art, and Editor-in-Chief of "The Art Bulletin", official journal of the College Arts Association of America (JA 218-219), testified as to the artistic merits of Eros as a whole (JA 221-222). According to Professor Janson, the Eros photographs of a nude man and woman which particularly disturbed the trial court (JA 364) were "outstandingly beautiful and artistic photographs. I cannot imagine a theme being treated in a more lyrical and delicate manner than it has been done here" (JA 221). Professor Janson also testified that "in terms of the material contained therein, the terms of the graphic lay-out and the taste displayed in the presentation of this material, [Eros] is certainly the equal of any magazine being published today" (JA 222).

On summation, the Government conceded that Eros was not "hard-core" pornography (JA 349).

(b) Liaison

Dr. McCormick, the psychologist, testified that the predominant effect of Liaison was not to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (JA 215). In fact, Dr. McCormick stated he found nothing sexually stimulating in Liaison for the normal person and that only an abnormally ill person could be sexually stimulated by Liaison's content (JA 215). Dr. Bennett, the psychiatrist, testified that Liaison would create no morbid, shameful or licentious thoughts in the average person and that there was nothing in Liaison which could in any way sexually stimulate the average person (JA 265-266). Dwight Macdonald testified that Liaison did not go substantially beyond customary limits of candor and was within the limits of sexual discussion found in other material freely available in the United States (JA 236-237).

(c) **The Handbook**

Mrs. Lillian Maxine Serett, author of the Handbook, testified that it was a completely factual autobiography (JA 227) and that her purpose in writing it was to communicate to lay persons the ideas that (1) various forms of sexual expression are normal and healthy and (2) women should have the same sexual rights as men (JA 226). She testified that since September 1960 (several years prior to petitioner Ginzburg's mailings) she had mailed thousands of copies of the book and that it had been purchased and used by doctors, ministers, and at least one medical school (JA 225-226).

Dwight Macdonald testified that the Handbook did not go substantially beyond the customary limits of candor that American society now permits in its literature (JA 235-236), and that the Handbook's sexual descriptions were less explicit than those of "Lady Chatterley's Lover" (JA 236), which he said was freely sold throughout the United States (JA 232).⁶

Dr. McCormick testified that the Handbook "would be quite useful as an educational instrument" (JA

⁶ Arthur J. Galligan testified concerning books and magazines that are sold from open stands and shelves at newsstands and bookstores at the Grand Central Terminal in New York City; in the vicinity of the New York Public Library at 5th Avenue and 42nd Street, at 6th Avenue and 42nd Street, New York City; at the southeast corner of 15th and Market Streets in Philadelphia; at Ranstead and 15th Streets in Philadelphia; at 11th and Chestnut Streets in Philadelphia; and on Market Street near the Court House (JA 242-253). Books and magazines which Mr. Galligan had purchased at these locations were introduced into evidence as Exs. D10-D43 (JA 256). The courts below (JA 367; App. "A", *infra*, pp. 4a, 6a) disregarded this and all other evidence (JA 230-239) of the contemporary standard and sustained petitioners' convictions for mailing literary materials which were clearly less offensive than other materials (Exs. D9-D43) in widespread circulation.

216) and, in response to the question whether the predominant effect of the Handbook was "to create in the average person an itching, morbid or shameful desire or longing with respect to sex" (JA 206), he said: "No, it is not. That is the distinction between pornographic and erotic material. The distinction * * * is that the pornographic material is morbid, does tend to corrode and to turn the person against himself in the process of reading or seeing. In the case of 'The Handbook', this effect will not take place for the ordinary person reading it" (JA 210). Dr. Bennett's testimony was substantially the same (JA 259-263, 264, 273).

Rev. George Von Hilsheimer, III, a Baptist minister trained and experienced in clinical psychology (JA 273)⁷ testified that he had used the Handbook in pastoral and psychological counseling since 1960 (JA 289). He said that the book was particularly valuable in dealing with the problems of married women who were guilt-ridden by their sexual values and experiences (JA 289). He stated that the book communicated

⁷ Reverend Von Hilsheimer studied theology and psychology at Washington University in St. Louis, the University of Miami, and the University of Chicago (JA 274-275). His training in psychology included extensive clinical activities at the Child Guidance Center in Lincoln Park and at the Association for Counseling and Therapy (JA 274). Reverend Von Hilsheimer has lectured extensively in universities and theological schools on such subjects as comparative religion, contemporary morals, education and therapy (JA 275). He is resident minister and group counselor for the Greater New York Humanist Council and is Executive Director of the Fund for Migrant Children (JA 275-277). Reverend Von Hilsheimer was also a ministerial counselor to the President's Study Group on National Voluntary Services and a board member of Mobilization for Youth, the first project established by the President's Committee (JA 276). His professional activities involve substantial contacts with underprivileged and culturally deprived persons in both urban and rural areas (JA 276, 277).

to such a reader the fact that her sexual attitudes were not unique and thereby tended to relieve guilt feelings. He considered this to be the book's most important value and added that it was more useful to him than standard marriage manuals (JA 292).

3. Rebuttal

The Government called three rebuttal witnesses to show that the Handbook had no social-scientific value.

Dr. Nicholas G. Frignito, Chief Psychiatrist of the County Court of Philadelphia (JA 316-317), testified that, in his opinion, the Handbook had no medical value and was "obscene" (JA 318-319). He stated that he thought the book a "menace" and that it "can lead to a lot of chaotic situations, because my interpretation of the book, it fosters promiscuity. It fosters sexual perversity" (JA 320). Over petitioners' continuing objection (JA 321, 322, 323), Dr. Frignito was permitted to testify as to the effect of the book upon adolescents stating that "it certainly is a very dangerous thing" and that "this type of book" encourages delinquency in adolescents because "it would lead to self-abuse, masturbation, and that * * * would lead to other types of sexual activity" (J.A. 320-324).

Dr. Ann Hankins Ford, M.D., a practicing psychiatrist (JA 335-336), testified that, in her opinion, the Handbook had no medical value in the field of psychiatry or psychology (JA 337) and that it would be disturbing, rather than helpful, in the treatment and counseling of her patients (JA 338). On cross-examination, Dr. Ford characterized her patients as "people who were disturbed in one way or another" (JA 339). Rev. Adolph E. Kannwischer, a Baptist minister (JA 342), testified that he would not use the Handbook in

pastoral counseling because he regarded it as "detrimental to a person who already is having problems" (JA 344).

Petitioners moved for a judgment of acquittal (JA 344, 345) which was denied (JA 348). Petitioners then requested that the court make special findings of fact in accordance with Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348). The following morning, the trial court entered a general finding of "guilty on all counts" (JA 349), and stated it would find the facts specially as requested by petitioners' counsel. The trial court said:

"At the earliest possible time they will be found. Meanwhile, I would like to request the Government through Mr. Creamer to submit to me proposed findings" (JA 349).

Mr. Creamer was not directed to serve a copy of the Government's proposed findings on petitioners' counsel, nor, of course, was petitioners' counsel asked to submit proposed findings in support of the general finding of guilty.

C. PROCEEDINGS AFTER TRIAL

On June 27, 1963, petitioners filed a timely motion in arrest of judgment or, in the alternative, for a new trial (JA 350) urging, *inter alia*, that the trial court found petitioners guilty without making findings of fact as required by Rule 23(c) of the Federal Rules of Criminal Procedure. Sometime thereafter, and prior to answering petitioners' motion, the Government gave the trial judge its proposed findings of fact. The proposed findings were neither filed in the docket nor served upon petitioners' counsel. On August 6, 1963, fifty-four days after petitioners had been found guilty

on all counts, the trial court filed special findings of fact (JA 351-353). The Government then filed its answer to petitioners' motion in arrest of judgment or for a new trial, and approximately three months later, the trial court filed an opinion (JA 354-368) denying the motion. The opinion specifically incorporated the court's previously made Special Findings but a portion denominated as "Discussion" added new and additional ones.

On December 19, 1963, the trial judge sentenced petitioner Ginzburg, a first offender, to five years imprisonment⁸ and a fine of \$28,000, and fined the corporate petitioners a total of \$14,000 (JA 373-376). A notice of appeal was filed the same day (JA 380).

On November 6, 1964, the Court of Appeals affirmed petitioners' convictions (App. "A", *infra*, pp. 1a-10a).

REASONS FOR GRANTING THE WRIT

Although 1,037 persons were charged with violations of the Federal obscenity statute (18 U.S.C. §§ 1461-1465) in the past four years, and in 1964 federal obscenity prosecutions were double those of 1961,⁹ the statutory standards remain obscure and speculation continues unabated. Kurland, *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 208-209 (1964).¹⁰ Is

⁸ Ginzburg received three years on the Handbook counts and two years on the Eros counts, the sentences to run *consecutively*.

⁹ *Admin. Off. of U.S. Courts Ann. Rep.*, Table D-4 (Fiscal 1961-Fiscal 1964). Prior to fiscal 1961, the annual report did not contain a separate "obscenity" tabulation.

¹⁰ Since there was no issue in *Roth v. United States*, 354 U.S. 476, as to the obscenity of the challenged materials (*id.* at 481, *ftn.* 8), "the Court * * * had no occasion to explore the application of a particular obscenity standard." *Manual Enterprises v. Day*, 370 U.S. 478, 489.

the Federal obscenity statute constitutionally limited to "hard-core" pornography? Is "prurient interest appeal" equivalent to erotic stimulation? Is a literary work which deals with sex in a manner that advocates ideas constitutionally protected despite expert disagreement as to its social importance? These and other questions vitally important to the future administration of the federal statute are all presented for review. The decision below is not only in conflict with decisions in other circuits and with applicable decisions of this Court but, if the opinion of the court of appeals is allowed to stand as a guide to future prosecutions, it will wreak havoc in the administration of 18 U.S.C. §§ 1461-1465. Ever since *Roth v. United States*, 354 U.S. 476, this Court and state and federal courts have all been grappling with the problem of "obscenity". The many questions petitioners raise (some of which require little or no discussion in this petition)¹¹ and the solutions which can be achieved on this record will go far toward eliminating the present confusion.

Apart from those questions directly involving administration of the Federal obscenity statute, petitioners seek review of important questions of federal criminal law. The practice of switching theories on appeal in order to sustain convictions, the manner in which the trial court made its findings, and the supplying on appeal of missing, but essential, findings by inferring them from other findings, would in an ordinary criminal case be of sufficient national importance to call for the exercise of this Court's certiorari jurisdiction. How much

¹¹ See Questions Presented Nos. 1(b), 1(e), 2(a), 3, and 6(b). Although petitioners recognize that they have presented many more questions than is normally appropriate, the court below in its effort to sustain petitioners' convictions committed many errors of substantial importance which petitioners are constrained to raise.

more important are they in this, a First Amendment case, which requires "the most rigorous procedural safeguards", *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66?

A. The court of appeals held (App. "A", *infra*, pp. 5a, 6a) that 18 U.S.C. § 1461 prohibits use of the mails to sell Eros a publication dealing with love and sex which the Government conceded was not "hard-core" pornography. This holding is in direct conflict with the holding of the Court of Appeals for the First Circuit in *Excellent Publications v. United States*, 309 F. 2d 362, 365 (1962), in which the publication "The Gent" was held not to be "the kind of 'hard-core pornography' within the reach of the statute construed in the light of the constitutional guarantee of freedom of the press." It is also in conflict with the holdings of the highest courts of New York,¹² California,¹³ and Massachusetts.¹⁴ The question "[w]hether hard-core pornography, or something less, be the proper test" was left open in *Manual Enterprises v. Day*, 370 U.S. 478, 489, and should be decided now.

Petitioners believe with Mr. Justice Harlan (*Roth*, 354 U.S. at 507-508) and Mr. Justice Stewart (*Jacobellis v. Ohio*, 378 U.S. 184, 197) that the Federal obscenity statute is constitutionally limited to "hard-core" pornography, provided that term is capable of definition. Petitioners' definition embraces the concepts enunciated by Drs. McCormick (JA 188-199, 202-206, 210) and Bennett (JA 259-263) in the trial court

¹² *People v. Richmond County News Co.*, 9 N.Y. 2d 578, 586.

¹³ *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 811.

¹⁴ *Attorney General v. The Book Named "Tropic of Cancer"*, 345 Mass. 11, 184 N.E. 2d 328, 333-334.

and the Solicitor General's description in *Roth v. United States*, 354 U.S. 476 (Br. 37-38). This "should provide a reasonably satisfactory and workable tool * * *." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 65 (1960). The problem, of course, is to enunciate a workable standard. If, on this record, a workable standard cannot be evolved, it can never be, and 18 U.S.C. § 1461 is hopelessly vague and uncertain.

B. The record made in the trial court establishes that the predominant effect of the challenged materials was *not* to create in the average person any morbid or shameful sexual desires (JA 206, 210, 211-212, 215, 264-266, 273). Nonetheless, the courts below held that all these publications were obscene. The problem here (and the one which may have caused the erroneous holding below) is that this Court did not clearly say what it meant by the term "appeals to prurient interest" in *Roth*, 354 U.S. at 489. If this Court is going to continue to adhere to its *Roth* definition of obscenity and not limit the federal statute to "hard-core" pornography as we urge (see *Jacobellis v. Ohio*, 378 U.S. 184, at 191, 200-201) then, at the very least, it should provide a workable definition of "pruriency".¹⁵

As we understand it, (1) "pruriency" is an "effect" element which can be measured only in terms of its impact on the average person, (2) material which appeals to prurient interest is erotically stimulating material which excites a morbid, shameful or unhealthy interest in sex, and (3) erotic stimulation of itself is

¹⁵ The problem of trying to define what this Court meant in *Roth* by the phrase "appeals to prurient interest" is discussed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 56-58 (1960).

not the equivalent of "pruriency".¹⁶ If this is what this Court meant to say in *Roth*, 354 U.S. at 487, ftm. 20, it did not do so explicitly enough for the court below. On this record, none of the challenged publications had the requisite "pruriency", yet the courts below held that they were all obscene. Either the decision below is in direct conflict with this Court's decision in *Roth*, or the *Roth* definition of "pruriency" should be made more explicit.

C. The court below held that the Handbook was obscene and that there was nothing of any social importance in it (App. "A", *infra*, p. 6a), despite the fact that it advocates ideas,¹⁷ and experts attested to its social-scientific importance and utility (JA 210, 216-217, 261-262, 289-292, 294-315). In addition to the author's views on the importance of early sex education and female equality in sexual activity (JA 226-227), Dr. Albert Ellis¹⁸ points out (Ex. G17, p. 8) that on the basis of the author's own sex experiences the Handbook

¹⁶ For varying definitions, see *Flying Eagle Publications v. United States*, 273 F. 2d 799, 803 (C.A. 1, 1962); *United States v. Keller*, 259 F. 2d 54, 58 (C.A. 3, 1958); *Big Table, Inc. v. Schroder*, 186 F. Supp. 254, 261 (N.D. Ill., 1960); *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182, 184, *aff'd* 72 F. 2d 705 (C.A. 2, 1934).

¹⁷ Although Mrs. Serett has been exceptionally frank in relating her sexual experiences, throughout the Handbook she employs accepted anatomical references rather than "gutter words", and on those occasions when reference to the anatomy is accomplished by means other than clinical phraseology, the reference serves an illustrative purpose (see, *e.g.*, Ex. G17, pp. 216-221, on the danger of double-talk to children).

¹⁸ Dr. Ellis is the author of the following books, among others: *The Folklore of Sex* (1951); *Sex, Society and the Individual* (1953); *The American Sexual Tragedy* (1954); *The Psychology of Sex Offenders* (1956); *Sex Without Guilt* (1958); *The Art and Science of Love* (1960); *Creative Marriage* (1960); and *Sex and the Single Man* (1963).

"manages to be duly skeptical of the allegedly superlative value of simultaneous climax [e.g., G17, pp. 225-227]; to emphasize the importance of focusing on sexual imagery [e.g., 224-225]; to deflate the myth of 'vaginal orgasm' [e.g., 225-227]; [and] to be highly dubious of the necessity of totally unplanned, 'spontaneous' coital activity [e.g., 122-123] * * *." See also *Frumkin*, IX *Journal of Human Relations*, 513 (Summer 1961); Bryan, "Review of the Housewife's Handbook on Selective Promiscuity", *Journal of American Institute of Hypnosis* (January 1962) (JA 16-19). It is this fact—that the Handbook advocates ideas—that validates its claim to be tested, not by any courtroom debate over its importance, but in the marketplace of ideas. Ideological sex expression cannot be required to abide by any consensus—whether public, expert, or judicial—if it is to be free and protected by the First Amendment. *Kingsley International Pictures v. Regents*, 360 U.S. 684, 689. If "material dealing with sex in a manner which advocates ideas * * * may not be branded as obscenity and denied the constitutional protection" (*Jacobellis v. Ohio*, 378 U.S. 184, 191), it is irrelevant that the disputed "utility" issue was resolved adversely to petitioners. This is an important question of federal law which has not been, but should be, decided by this Court.

Just as the courts below erroneously refused to accord constitutional protection to the ideological sex expression contained in the Handbook, they erroneously balanced away all the socially important content of *Eros* (JA 362-366; App. "A", *infra*, pp. 5a-6a). Notwithstanding the fact that the indictment charged that *Eros* was "obscene when considered as a whole" (JA 149), the courts below suppressed the whole because they thought that parts had "prurient interest ap-

peal". This holding is in direct conflict with the views expressed by Mr. Justice Brennan in *Jacobellis v. Ohio*, 378 U.S. 184, 191, and with the holdings of the highest courts of California¹⁹ and Illinois.²⁰

D. The court below held (App. "A", *infra*, p. 9a) that no error was committed when the trial court over petitioners' repeated objections (JA 321, 322, 324), permitted Dr. Frignito, a Government psychiatrist, to testify as to the Handbook's effect upon adolescents (JA 321-324). The trial court accorded such testimony great, if not conclusive, weight and stated that a defense witness shocked him "by saying that this book should be in every home and available for teenagers for guidance in sex behavior, but in my opinion misbehavior" (JA 366).²¹

The holding below is in direct conflict with the holding of the Court of Appeals for the Sixth Circuit in *Volanski v. United States*, 246 F. 2d 842 (1957), another obscenity case tried to the district court *without a jury*. In *Volanski*, a psychiatrist was permitted "to

¹⁹ *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 813.

²⁰ *People v. Bruce*, — Ill. —, 33 L. W. 2270 (Nov. 24, 1964).

²¹ The trial court's concern over the Handbook's effect on adolescents (JA 271, 272, 296, 297-298, 300-307) and its admission of the Frignito testimony caused it to adopt (JA 368) the rejected "composite test" for measuring pruriency. Compare *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840, 845. After *Roth v. United States*, 354 U.S. 476, the composite test was abandoned by all courts in favor of "[t]he impact upon the average person" test. *E.g.*, *Womack v. United States*, 294 F. 2d 204, 205 (C.A.D.C., 1961); *Grove Press v. Christenberry*, 175 F. Supp. 488, 499 (SDNY, 1959), *aff'd* 276 F. 2d 433 (C.A. 2, 1960). "The . . . formulation of the test as a composite of all elements in society retains most of the objectionable rigor of the old Hicklin rule . . ." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 72 (1960).

state his expert opinion that the pictures would have an undesirable effect upon juveniles. That the court's decision was based in large part on this evidence is revealed by the trial judge's oral opinion." *Id.*, at 843. In reversing the conviction, Judge (now Mr. Justice) Stewart said: "The admission of this evidence was prejudicial error." *Id.*, at 844. For present purposes, that case and this case are indistinguishable and the holding below is in irreconcilable conflict with *Volanski*.

E. The trial court admitted over objection letters from Frank Brady, Associate Publisher of Eros Magazine, Inc., to the postmasters of Blue Ball (Ex. G1) and Intercourse (Ex. G2) (JA 154-155, 157) and then found that *all* petitioners sought to mail from Blue Ball, Pennsylvania, from Intercourse, Pennsylvania, and finally did mail from Middlesex, New Jersey (JA 351) "in order that the postmark of [the] mailed material would further [petitioners'] general scheme and purpose" (JA 351). The indictment did not charge a conspiracy and there was no evidence of any general scheme and purpose. Evidence of "intent" cannot be transferred from one defendant to another merely because they are tried together, and the Brady letters were admissible, if at all, only against Eros Magazine, Inc. and not against Ginzburg, Liaison News Letter, Inc. or Documentary Books, Inc. Cf. *Kotteakos v. United States*, 328 U.S. 750, 772, 776-777.

Although conviction was based on the theory that all petitioners were engaged in a "general scheme and purpose" to commercially exploit obscenity, the court below held that the erroneous transfer of intent evidence was immaterial because petitioners stipulated that they knew the contents of the mailed publications

(App. "A", *infra*, pp. 8a-9a). Whether or not proof of a specific criminal intent (i.e., that petitioners knew the challenged materials to be obscene) is necessary,²² "an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied" *Wilson v. United States*, 250 F. 2d 312, 325 (C.A. 9, 1957). In holding the erroneous transfer of evidence of intent to be harmless, the court below enabled petitioners' "conviction to rest on one point and the affirmance of the conviction to rest on another"—a violation of due process. *Russell v. United States*, 369 U.S. 749, 766. The court below decided this question in a way in direct conflict with this Court's holding in *Cole v. Arkansas*, 333 U.S. 196, 201-202.

F. Despite a timely request for "special findings" under Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348), the trial court reserved decision on that request (JA 348, 349), entered a general finding of "guilty on all counts" (JA 349), instructed the prosecutor to prepare "proposed findings" (JA 349) which petitioners were never shown, and then adopted the prosecutor's findings fifty-four days later

²² Compare *Smith v. California*, 361 U.S. 147, 154-155, and *Morissette v. United States*, 324 U.S. 246, with *Rosen v. United States*, 161 U.S. 29, 41. Substantial portions of the opinion below deal with the Blue Ball and Intercourse incidents, the manner in which Eros was advertised, and the prices charged for the challenged publications (App. "A", *infra*, pp. 1a-2a, 5a, 7a). Such evidence would have no bearing on whether the challenged materials were intrinsically obscene, and evidence of this nature could be material only if an essential element of the crime is an intent to appeal to prurient interest for a profit. Unless this Court holds that proof of such intent is a necessary requisite for conviction, the opinion below will open the door to prejudicial use of irrelevant evidence of motive and intent.

(JA 351-353).²³ Findings made in such a manner deprived petitioners of the safeguards that a requirement of fact finding is designed to afford. *Proceedings of the Institute on Federal Rules of Criminal Procedure*, 5 FRD 183, 188-189, 199-200 (1945); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657; *United States v. Merz*, 376 U.S. 192, 199; *United States v. Forness*, 125 F.2d 928, 942 (C.A. 2, 1942). By acknowledging that most of the facts were not clear and precise (JA 359) and that findings required "careful consideration * * *, detailed legal research and assistance of counsel" (JA 360), the trial judge revealed that his general finding was a visceral reaction, buttressed later by "facts" and "conclusions" he had not thought through before arriving at a verdict.

In the past five years there have been 9,932 federal criminal cases tried without juries²⁴ yet no court has

²³ The trial court excused its failure to make special findings contemporaneous with the general finding on the grounds that (1) the trial judge made clear to counsel that special findings would be delayed and defense counsel did not object to the proposed procedure (JA 359) and (2) petitioners "were not precluded from submitting findings but apparently chose not to do so" (JA 360). The record shows that the trial court reserved decision on petitioners' request for special findings (JA 348, 349) and never indicated that special findings would not be made contemporaneous with a general finding until after it pronounced petitioners guilty and directed the Government to submit "proposed findings" (JA 349). The court of appeals notwithstanding (App. "A", *infra*, pp. 7a-8a), an objection subsequent to the entry of the general finding could not have enabled the trial court to cure the error. Furthermore, petitioners' timely motion for a new trial raising an objection prior to the *ex parte* submission of the Government's "proposed findings" was dismissed by the trial judge as an "afterthought" (JA 360). On the second point, we believe it unnecessary to comment upon the court's reliance on petitioners' failure to insist upon their "right" to submit proposed findings in support of the guilty verdict.

²⁴ *Admin. Off. of U.S. Courts Ann. Rep.*, Table D-4 (1960-1964).

spoken authoritatively on the requirements of Rule 23(c). To petitioners' knowledge, this is the first time this Court has been called upon to pass on the issue. Since the problem constantly recurs in criminal non-jury cases and is of obvious importance in the future administration of Federal criminal justice, surely the question is one this Court should decide.

G. Despite the fact that the trial court explicitly found that the Handbook and Liaison, but not Eros, were "patently offensive" and substantially exceeded customary limits of candor (JA 351-353) and that the Handbook and Eros, but not Liaison, "appealed to prurient interest" (JA 352-353),²⁵ the court below supplied the essential but missing findings (*i.e.*, that Eros was "patently offensive" and that Liaison "appealed to prurient interest") by inferring their existence from other findings and from the trial court's opinion (App. "A", *infra*, p. 7a). This runs counter to the evident purpose of Rule 23(c) of the Federal Rules of Criminal Procedure,²⁶ and raises problems of a serious constitutional dimension.

Although it is settled that an appellate court is "not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings", *Stone v. United States*, 164 U.S. 380, 383, still unanswered is whether an appellate court in a criminal case may supply essential findings by inference. We think not. Rule 23(c) requires that the trial court make all the essential findings. Defects

²⁵ The trial court found that Liaison was "published for the purpose of appealing to the prurient interest of the average individual", not that Liaison had any prurient interest appeal in fact (JA 352).

²⁶ *Proceedings of the Institute on Federal Rules of Criminal Procedure*, 5 FRD 184, 199-200 (1945).

in the fact-finding process cannot be remedied on appeal. *Quinn v. United States*, 203 F. 2d 20, 25 (D.C. Cir., 1952), reversed on other grounds, 349 U.S. 155; cf. *Cole v. Arkansas*, 333 U.S. 196, 201-202. In view of the obvious importance of this question, and since the problem will undoubtedly recur, this Court should decide it now.

CONCLUSION

The decision below reverses the trend of this Court's obscenity decisions beginning with *Roth v. United States*, 354 U.S. 476, and culminating last term in the *per curiam* reversals in *Tralins v. Gerstein*, 378 U.S. 576, and *Grove Press v. Gerstein*, 378 U.S. 577. See *Larkin v. G. P. Putnam's Sons*, 14 N. Y. 2d 399, 404-405. If the First and Fourteenth Amendments prohibited the challenged publications in the last three cited cases from being held "obscene" under the laws of Florida and New York, the First Amendment prohibits petitioners' convictions here.

The United States Attorney (JA 371) and the Post Office Department consider this a test case and the most important federal obscenity prosecution of recent times. Unless certiorari is granted and the convictions below reversed, federal prosecutors may take the opinion below, and its affirmance of the five year sentence meted out to petitioner Ginzburg, as a signal to begin wholesale prosecutions under the federal statute. Cf. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 36-37 (1960).

By reason of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14742, 14743, 14744 and 14745

UNITED STATES OF AMERICA,

v.

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., AND LIAISON NEWS LETTER, INC., *Appellants.*

Appeals from the United States District Court for the
Eastern District of Pennsylvania

Argued June 16, 1964

Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges*

Opinion of the Court

(Filed November 6, 1964)

By McLAUGHLIN, *Circuit Judge.*

Appellants were convicted of violating the federal obscenity law, 8 U.S.C. § 1461. All three publications involved were found to be obscene under the statute. The record shows that in September, 1962, appellant Eros Magazine, Inc. of which appellant Ginzburg was editor and publisher, after a great deal of deliberation endeavored to obtain what was considered advantageous mailing privileges from Blue Ball, Pennsylvania. Meeting with no success there, a similar try was made with the Post Office at Intercourse, Pennsylvania. Again rejected a final successful effort was made at the Middlesex, New Jersey Post Office from which over five million advertisements of Eros were mailed. It is not disputed that the bulk of the mailings for the three publications was from Middlesex. In the advertisements above mentioned, inter alia, appeared the following:

"The publication of this magazine—which is frankly and avowedly concerned with erotica—has been

enabled by recent court decisions * * * to be published."

The magazine Eros was thereafter mailed out from Middlesex. It is with Volume 1, No. 4, 1962 thereof that we are concerned. Eros is a quarterly. Its price is \$25. a year.

The second publication was mailed in November, 1962. It was a book which had been originally titled by its author "The Housewife's Handbook for Promiscuity". That book so titled had been sold by mail to a selected list by the author. The title was later changed to read "Housewife's Handbook on Selective Promiscuity". The mailing in this instance was under the latter title. Its price is \$4.95.

The third publication is a biweekly newsletter called Liaison. According to the witness Darr who was hired by appellant Ginzburg as editor of Liaison, Ginzburg told him that "* * * Liaison was to cover the same scope [as Eros], in a more newsworthy fashion." Darr was hired after he had specially written and submitted a piece titled "How to Run a Successful Orgy". Ginzburg telephoned him and asked him "When can you start to work?" The particular piece in revised form was published in Liaison. The price of Liaison was \$15, later reduced to \$4.95.

The advertising material, concededly not obscene of itself, was admittedly mailed by appellants on the specified dates with full knowledge of its contents.

The case was tried to the court, a jury trial having been waived by appellants. The trial consumed five days. Appellants were found guilty on all counts on June 14, 1963. Later, at the request of the appellants, on August 6, 1963, the court filed special detailed findings of fact. Summing up those findings, the court said:

"In conclusion, after a thorough reading and review of all the indicted materials, this Court finds that

said materials are compilations of sordid narrations dealing with sex, in each case in a manner designed to appeal to prurient interests. They are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake."

We have read, examined and considered the publications involved in this appeal, "* * * in the light of the record made in the trial court, * * *." *Jacobellis v. Ohio*, — U.S. — (P. 11, slip op.) (1964). The only important question before us is whether the publications are obscene under the federal statute. Since this calls for a constitutional judgment it is our duty to decide it. Under the obscenity tests laid down by the Supreme Court, the Constitutional status of the publications "* * * must be determined on the basis of a national standard." *Jacobellis*, *supra*, p. 10, slip op. This is peculiarly fitting here where over five million advertisements for the Eros material were mailed out to prospects in this country.

Also we have very much in mind that as the Supreme Court stated in *Roth v. United States*, 354 U.S. 484 (1957):

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The Court went on to say, p. 487, that "* * * sex and obscenity are not synonymous" and ruled on p. 487 that

"Obscene material is material which deals with sex in a manner appealing to prurient interest." It quoted with approval the American Law Institute, Model Penal Code, proposed official draft (May 4, 1962), § 251.41(1):

"* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters * * *."

The same necessary quality named in *Roth*, supra, and *Jacobellis*, supra, as affronting current national community standards is described in *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962) as "'patent offensiveness' or 'indecentness'". At pages 483, 484, the *Day* opinion, speaking of the federal obscenity law, notes that "* * * the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. * * * the statute reaches only indecent material which, as now expressed in *Roth v. United States*, supra, at 489, 'taken as a whole appeals to prurient interest'."

This brings us to the special circumstances revealed in the present appeal. We are not dealing with a novel by a well known novelist, written as and for a work of fiction with a firm base of opposition to well defined then existing social conditions, which was held mailable because its "* * * predominant appeal * * * [was] demonstrably not to 'prurient interest'." *Grove Press v. Christenberry*, 276 F.2d 433, 437 (2 Cir. 1960). Nor have we in this appeal anything comparable to the autobiographical account of the scabrous life of a writer of some pretensions, where numerous revolting episodes were part of a text which the Supreme Court of Massachusetts (184 N.E.2d 328, 334 (1962)) accepted "* * * as a conscious effort to create a work of literary art."

What confronts us is a sui generis operation on the part of experts in the shoddy business of pandering to and exploiting for money one of the great weaknesses of human being. Appellants' fundamental objective obviously was and is to, more or less openly, force their invitations to obscenity upon the American public through the United States mails. They did this in reliance on their own ill conceived theory that all barriers to obscenity have in effect been removed. They were not concerned with trying to circulate authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of a work, whatever art form it may be. Eros was declared as avowedly concerned with one thing, what in the prospectus is described as "erotica" and *which, it is stated, has been enabled to be published "by recent court decisions."* (Emphasis supplied). An undeniable example of what was meant by erotica is the content of Eros, Vol. 1, No. 4.

Seemingly to soften their approach and to pick up whatever support that might be available, appellants offer separate defenses for each of the publications. For Eros it is claimed in the brief that it "has redeeming social importance with respect to literary and artistic values". Having in mind the above proclaimed objective, even a casual reading makes it readily apparent that bits of non-statutory material have simply been laced into the obscene structure which is the Eros volume in evidence with the intent of creating that impression. This seems to us not just frivolous but a bold attempt to pioneer both in the elimination of the law itself and in the collection of the resultant profits. We have not seen nor been referred to any decision which countenances that sort of brazen chicanery. If permitted, it would stultify the carefully wrought formula whereby the basic law guarding the national community from obscenity is upheld but not at the expense of honest ideas founded on at least some social importance even if it be but the slightest.

From our own close reading and scrutiny of *Eros*, its basic material predominantly appeals to prurient interest; it is on its face offensive to present day national community standards, and it has no artistic or social value. The sham device of seeking to somewhat cloak the content with non-offensive items falls of its own evil weight. Cf. *Kahm v. United States*, 300 F.2d 78 (5 Cir. 1962).

It is asserted that the Handbook has some social-scientific importance. Testimony along that line was expressly disbelieved by the trial judge. Our own reading and examination of this work leads us to the same conclusion. The original title to the book gives its real purpose. That title, "The Housewife's Handbook for Promiscuity" is a fitting capsule description of the content. The mere change in the title, making it sound like some sort of a text book or tract, shows the arrogant insistence of these appellants that raw obscenity is at this time properly an element of national community life. There is nothing of any social importance in the Handbook. It is patently offensive to current national community standards. Applying those standards to the average person its dominant theme as a whole appeals to prurient interest.

Appellants would have it that the book fits into the same category as "Fanny Hill", found not obscene by the New York Court of Appeals in *Larkin, et al. v. G. P. Putnam*, — N.Y.2d — (opinion filed July 10, 1964). Whatever may eventually be the outcome of that litigation, it has no bearing on this appeal for, inter alia, it was there specifically held as to the book that "It has a slight literary value and it affords some insight into the life and manners of mid-18th Century London."

It is argued that *Liaison*, the newsletter, is without the statute, on the ground that it does not appeal to prurient interest. As we have seen, according to Ginzburg, the directing head of all three publications, the purpose of *Liaison* was to cover the same scope as *Eros*, in a more

newsworthy fashion. Our study of it bears this out. Its material openly offends current national community standards in much the same fashion as does Eros. Taken as a whole, its appeal is directed to the prurient interest of the average person in the national community. The type of thing that it is, as visualized from the test given the successful candidate for its editor, is confirmed by the material printed in it. There is no pretension that it has any social significance or literary merit.

There is defense testimony which would have it that all three publications are not within the reach of the statute. The trier of the facts was not persuaded by it nor are we.

Finding, as we do, that Eros, the Handbook and Liaison are obscene, affirmance of the convictions on the advertising counts follows as of course.

The contentions of appellants that the convictions on the Eros and Liaison counts must be reversed because the trial court failed to find those publications guilty within the statute are without merit. This is clear as to Eros in the Special Findings of Fact, Nos. 16, 17, 18, 19, the concluding paragraph of the Findings above quoted and also, though it is not necessary, in the court's opinion under the caption "Eros Vol. 1, Number 4, 1962." The Liaison Findings, which fully substantiate conviction on those counts, are Numbers 11, 12, 13, 14, 15, the concluding paragraph of the Findings and also, though it is not necessary, the court's opinion under the caption "Liaison Vol. 1, No. 1."

There is no substance to the complaint regarding the time of filing of the Special Findings of Fact. Rule of Criminal Procedure 23(a) provides that: "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

The trial court's comment in its opinion on this point which is in strict accord with the record, is as follows:

"During the trial the Court made it clear to counsel on more than one occasion that the entry of special findings would be delayed beyond the entry of a general finding if a general finding of guilty was to be entered on any of the counts. There were no objections by defendants' counsel to this proposed procedure. Thus, any objection to the delayed entry of special findings was waived by silence on the record. Likewise after verdict was rendered by the Court, no objections were stated for the record at that time.

"On the merits, this was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. This is the nature of the case. It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer. Defendants were not precluded from submitting findings but apparently chose not to do so. We find no merit in this issue raised by them, apparently as an afterthought."

Under the facts the findings were filed promptly and properly within the above rule.

It is also asserted that the trial court converted evidence of criminal intent admissible against one defendant into proof of criminal intent on the part of all defendants. This concerns the two unsuccessful attempts to mail out Eros advertising material. The successful mailings from Middlesex were for all three publications. The point is

de minimis in any event. The stipulation between counsel for the parties and approved by the court states that the advertising material was mailed by the defendants on the occasions alleged in the indictments with full knowledge of the contents thereof. We do not find the slightest indication of any substantial confusion on the part of the trial judge with reference to the attempted mailings and mailings of the material involved in the appeal.

Appellants object to the admission of the rebuttal testimony of Government witness, Dr. Frignito. This testimony was rightfully presented and received as rebuttal evidence. The witness' complete answer as to the effect of the Handbook makes it evident that he was considering the book's effect on the entire community, not some group thereof. We find no error in this connection.

Appellants claim error because at the time of the defense motions for dismissal of the indictment and for acquittal at the end of the Government's case, the trial judge who had read the indictment, as he says in his opinion, had not read at that time " * * * each and every word or sentence of each of the indicted materials * * * " but, as he further said, " * * * the Court read enough of the indicted materials to be able to rule as a matter of law that the Government had made out a prima facie case." There is no prejudicial error in this incident.

Finally, appellants urge that the court erred in striking the affidavit and exhibits in support of the defense motion to dismiss the indictment. The defense on that motion was correctly limited by the court to the face of the indictment and whether it accurately charged the named offenses and gave adequate notification thereof to the defendants. The defense attempted by the affidavit and letters to put before the court in ex parte form, opinions from various sources favorable to the Handbook. These were trial matters and so held by the judge.

The district judge was acutely aware of the issue of constitutional law raised in this action. He was conversant

with the Supreme Court's views on the federal obscenity statute and was guided accordingly. Our study of the record, including the transcript and convicted materials, establishes that he tried it fairly, carefully and competently. He made no substantial errors of law. We are convinced that, under the evidence, he was justified in finding the defendants guilty on all counts. As we have indicated, we have independently arrived at that same conclusion.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

APPENDIX B

Constitutional Provisions Involved:

First Amendment: Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Fifth Amendment: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment: In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation * * *.

Statute Involved:

§ 1461. *Mailing obscene or crime-inciting matter:*

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; and

* * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Rule Involved:

Federal Rules of Criminal Procedure. Rule 23. Trial by Jury or by the Court:

* * *

(c). Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No.  42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND ITS PENNSYLVANIA AFFILIATE,
AMICI CURIAE**

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AND ITS PENNSYLVANIA AFFILIATE,
*AMICI CURIAE***

Interest of *Amici*

The American Civil Liberties Union has been engaged for more than forty years in defending the Bill of Rights. Foremost of those rights is the First Amendment which declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Notwithstanding that injunction, the petitioner in this case has been convicted under a federal statute (18 U. S. C. §1461) of mailing "obscene" publications, sentenced to five years imprisonment and fined \$28,000.

The censor's heavy hand has won judicial sanction in this case. *Amici* believe that the conviction and affirmance below pose such a serious danger to literary freedom in

the United States that it is imperative certiorari be granted so that the entire record will be before the Court for the close scrutiny which is always required where the government asserts the power to declare that a publisher has committed a crime by putting ink to paper.

Statement of Facts

Petitioner was convicted under the federal obscenity statute (18 U. S. C. §1461) of using the mails to distribute the magazine *Eros*, Vol. 1, No. 4, a book entitled *The Housewife's Handbook of Selective Promiscuity*, and a newsletter entitled *Liaison*, Vol. 1, No. 1.

At trial, the government offered no expert witnesses on its case in chief. The petitioner, on its case, offered the testimony of a clinical psychologist, the Chairman of the Fine Arts Department of New York University, the critic Dwight McDonald, a practicing psychiatrist, and a Baptist minister. On rebuttal, over objection, the government offered the testimony of two psychiatrists and its own Baptist minister.

Reasons for Granting the Writ

1. Certiorari should be granted so that in this case, "as in all others involving rights derived from the First Amendment guarantees of free expression, this Court [can make] an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis v. Ohio*, — U. S. —, 12 L. Ed. 2d 793, 799.

The standard for determining "obscenity" which was enunciated in *Roth v. United States*, 354 U. S. 476 and *Manual Enterprises v. Day*, 370 U. S. 478, is by the Court's

own admission "not perfect" (*Jacobellis v. Ohio*, — U. S. at —, 12 L. Ed. 2d at 800); and the line between "obscenity" and expression which is constitutionally protected is admittedly "dim and uncertain" (*Jacobellis v. Ohio*, — U. S. at —, 12 L. Ed. 2d at 797). Thus, the Court has the responsibility, as long as *Roth* is the constitutional key, to examine the whole record in "obscenity" convictions with the greatest care to insure that freedom of speech and of the press is not sacrificed to the censor, over-zealous or not. Cf. *Bantam Books v. Sullivan*, 372 U. S. 58.

2. Furthermore, certiorari should be granted in order to reconsider the *Roth* doctrine. It has been recognized by members of the Court¹ and by commentators² that that standard is vague and unworkable. For example, three of the four questions which *amicus* fairly posed in its brief (p. 20) in *Jacobellis*, *supra*, suggest the enormous if not insurmountable difficulties presented by *Roth*: (1) How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases; (2) Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience; (3) How is the determination that material is "utterly

¹ *Roth v. United States*, 354 U. S. at 494-495 (Mr. Chief Justice Warren concurring); *Smith v. California*, 361 U. S. 147, 157 (Mr. Justice Black concurring); *Roth v. United States*, 354 U. S. at 512-514 (Mr. Justice Douglas dissenting); *Roth v. United States*, 354 U. S. at 497-498 (Mr. Justice Harlan concurring in part and dissenting in part).

² Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960). See too brief (pp. 16-41) of the American Civil Liberties Union, *amicus curiae*, in *Jacobellis v. Ohio*, *supra*.

without redeeming social importance" to be made? Is the determination to be made by the application of literary or artistic standards or left to the determination of juries?"

The case at bar, given the testimony at trial for the defense by a panoply of psychiatric, religious and literary witnesses, dramatizes the inutility—if not the invalidity—of each element of the *Roth* standard. Full briefing and oral argument will afford the opportunity to reexamine again the shaky foundation upon which this threat to First Amendment freedoms rests.

3. Lastly, certiorari should be granted to allow reconsideration of the question whether *Roth* did not depart from the constitutional standard best designed to give the widest latitude to the precepts of a free society without endangering competing social interests. We refer to the clear and present danger test.

It is *amici's* view that "obscenity," as much as any other form of speech, is entitled to the protection of the First Amendment. Accordingly, the question in each case is whether the words or pictures are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantive evil which the state has a right to prevent. See *Schenck v. United States*, 249 U. S. 47; *Whitney v. California*, 274 U. S. 357.⁴

There is no demonstrable connection between the evil which obscenity statutes are intended to avoid and the

³ The fourth question, which asked which community's "contemporary standards" are to be applied, was, of course, answered in *Jacobellis*.

⁴ Even the modification of *Dennis v. United States*, 341 U. S. 494, is preferable to *Roth*. See note 5, *infra*.

means chosen to avoid that evil.⁵ There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted. Furthermore, some of the "evils" alleged are not evils in a society which cherishes and thrives on freedom and liberty. See, e.g., *Kingsley International Pictures v. Regents of State of New York*, 360 U. S. 684.

⁵ See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S. v. Roth*, 237 F. 2d 786, 804 (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts*, 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S. v. Roth*, *supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949).

CONCLUSION

This case is representative of a paradox within our multiple jurisdiction system that underlines its general importance. The same issue of *Eros* on which the conviction below was based, was the subject of grand jury investigation in New York County under Section 1141 of the New York Penal Law, but the grand jury refused to indict. Thus despite the application of a national community standard, a work which was not even indictible in New York City was the basis for conviction in federal court in Philadelphia. This is no isolated example of the capricious nature of obscenity prosecutions (cf. *United States v. West Coast News Company*, 228 Fed. Supp. 171 (D. W. D. Mich. 1964)), nor is it intended to be. See 1958 U. S. Code and Congressional News Annotated, pp. 4012-4018).

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF

Kay Boyle, Peter De Vries, Mark Van Doren, Lucy Freeman, Herbert Gold, Dan Greenberg, Joseph Heller, Nat Hentoff, Christopher Isherwood, James Jones, Norman Mailer, Martin Mayer, Henry Miller, Philip Roth, Irwin Shaw, William Styron, Robert Penn Warren, Sloan Wilson, AUTHORS; Jack Gelber, Arthur Miller, Elmer Rice, PLAYWRIGHTS; Maxwell Geismar, Paul Goodman, Granville Hicks, Dwight Macdonald, Mark Schorer, CRITICS; Lawrence Ferlinghetti, Allen Ginsberg, John Crowe Ransom, Kenneth Rexroth, Karl Shapiro, May Swenson, Louis Untermeyer, Peter Viereck, POETS; Oscar Brand, Lenny Bruce, Les Crane, Bob Dylan, Sam Levene, Henry Morgan, ENTERTAINERS; Otto Preminger, Dore Schary, Herman Shumlin, Sanford Socolow, PRODUCERS/DIRECTORS; Ruth Adams (Managing Editor, *Bulletin of the Atomic Scientists*), Harry Benjamin, M.D. (Board of Consultants, *Sexology Magazine*), Laura Bergquist (Senior Editor, *Look Magazine*), William Jennings Bryan, Jr., M.D. (Editor-in-Chief, *Journal of the American Institute of Hypnosis*), Arthur A. Cohen (Editor-in-Chief, *Holt, Rinehart & Winston, Inc.*), Jason Epstein (Editor; Vice President in Charge of Modern Library, *Random House, Inc.*), Harry Golden (Editor; Publisher, *The Carolina Israelite*), Dr. John Greenway (Editor, *Journal of American Folklore*), Robert T. King (Editor, *New York*

(Continued on inside of cover)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 807

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF

Kay Boyle, Peter De Vries, Mark Van Doren, Lucy Freeman, Herbert Gold, Dan Greenberg, Joseph Heller, Nat Hentoff, Christopher Isherwood, James Jones, Norman Mailer, Martin Mayer, Henry Miller, Philip Roth, Irwin Shaw, William Styron, Robert Penn Warren, Sloan Wilson, AUTHORS; Jack Gelber, Arthur Miller, Elmer Rice, PLAYWRIGHTS; Maxwell Geismar, Paul Goodman, Granville Hicks, Dwight Macdonald, Mark Schorer, CRITICS; Lawrence Ferlinghetti, Allen Ginsberg, John Crowe Ransom, Kenneth Rexroth, Karl Shapiro, May Swenson, Louis Untermeyer, Peter Viereck, POETS; Oscar Brand, Lenny Bruce, Les Crane, Bob Dylan, Sam Levene, Henry Morgan, ENTERTAINERS; Otto Preminger, Dore Schary, Herman Shumlin, Sanford Socolow, PRODUCERS/DIRECTORS; Ruth Adams (Managing Editor, *Bulletin of the Atomic Scientists*), Harry Benjamin, M.D. (Board of Consultants, *Sexology Magazine*, Laura Bergquist (Senior Editor, *Look Magazine*), William Jennings Bryan, Jr., M.D. (Editor-in-Chief, *Journal of the American Institute of Hypnosis*), Arthur A. Cohen (Editor-in-Chief, Holt, Rinehart & Winston, Inc.), Jason Epstein (Editor; Vice President in Charge of Modern Library, Random House, Inc.), Harry Golden (Editor; Publisher, *The Carolina Israelite*), Dr. John Greenway (Editor, *Journal of American Folklore*), Robert T. King (Editor, New York University Press), Paul Krassner (Editor and Publisher, *The Realist*), Eric Larrabee (Editor, *Harper's Magazine*), Martha MacGregor (Book Editor, *New York Post*), Kenneth McCormick (Vice President and Editor-in-Chief, Doubleday and Company, Inc.), Eric Moon (Editor, *Library Journal*), Philip Rahv (Editorial Board, *Partisan Review*), EDITORS; George Braziller (Publisher, George Braziller, Inc.), Edward M. Crane (Publisher and President, D. Van Nostrand Co., Inc.), Hugh

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AS AMICI CURIAE

INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT

Amici are more than one hundred publishers, editors, producers, directors, librarians, artists, writers, scholars, psychologists, psychiatrists, physicians, clergymen and others, alarmed that under our Constitutional system a person may be sentenced to prison for using the mails in the distribution of publications concerned with sex. Amici are dismayed that the august powers of the federal government, and of the federal judicial system, can be discharged to fine and jail an editor—publisher like Ralph Ginzburg, and to suppress from circulation and publication throughout the United States a magazine like *EROS*. If this Court fails to set aside such acts of punishment of a person and suppression of publications, we fear it will have severely constricted this country's parameters for permissible discussions of sex. If the judgments of the courts below are not reviewed and reversed, we fear this nation will go lame in the freedom of its sexual expression.

ARGUMENT

I.

EROS was (prior to its suppression as a result of the prosecutions below) a bold new magazine of importance. Its editor and publisher, Ralph Ginzburg, is the author of two books¹ and of articles appearing in such national magazines as *Harper's* and *Reader's Digest*.² He has been articles editor of *Esquire*.³ Four

¹ *An Unhurried View of Erotica* (1958) and *100 Years of Lynchings* (1962).

² *Harper's* vol. XXII, January, 1962 at p. 790; *Reader's Digest*, vol. XXI, March, 1958 at p. 808. See also *Coronet*, vol. XIX, summer, 1953 at p. 975 and *Theatre Arts*, June, 1953. In addition, articles by Mr. Ginzburg are reported to have appeared in *Collier's*, *Look*, *Outdoor Life*, *Esquire*, *This Week* and *Playboy* magazines.

³ *Esquire*, December, 1958 at p. 6.

issues⁴ of *EROS* had been published, the fourth being the issue condemned below. Although largely concerned with sex, a cursory examination by the Court of that (or any other) issue of *EROS* will show this publication could never properly have been found worthless—"utterly without any redeeming social importance" or obscene. *Roth v. United States*, 354 U.S. 476; *Jacobellis v. Ohio*, 378 U.S. 184; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; Kalven, *Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1. In the words of the *Saturday Review*, *EROS* was "a lavish production full of classical references and art and will likely become known as the *American Heritage* of the bedroom".⁵ This Court's duty to undertake an independent examination of the claim to Constitutional protection of a work has often been recognized. *Jacobellis v. Ohio*, *supra* at 187-188; *Grove Press, Inc. v. Gerstein*, *supra*; *Tralins v. Gerstein*, 378 U.S. 576; *Manual Enterprises v. Day*, 370 U.S. 478, 488; *Roth*

⁴ Issues of *EROS* may be found at the Library of Congress.

⁵ *Saturday Review*, Vol. XLV, No. 9, March 3, 1962 at p. 6. Counsel is advised that prior to its suppression, the magazine had received a number of arts and design awards, namely:

Citation of the American Society of Illustrators;

Six Awards of Distinctive Merit by Commercial Art magazine;

Gold Medal and Citations of the 1963 Annual Show of the Art Directors Club of New York; and

Award of Merit from the Art Directors Club of New Jersey.

Counsel is also advised that portions of *EROS*, including the remarkable photographic tone poem called "Black and White in Color", particularly condemned below, were scheduled for reproduction in the official United States State Department magazine, *America*.

v. *United States*, *supra*, at 497; *Times Film Corp. v. Chicago*, 355 U.S. 35; *Mounce v. United States*, 355 U.S. 180; *One, Inc. v. Olesen*, 355 U.S. 371; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *Kingsley International Pictures v. Regents*, 360 U.S. 684, 707-708; *Smith v. California*, 361 U.S. 147, 169. Any need to exercise that duty in this case could well be dispensed with since, among other well qualified witnesses below, one of the nation's most perceptive critics of popular culture, Dwight Macdonald, testified to *EROS*' importance (JA 238-240). In any case where, at trial or with independent examination upon review, a work evidences some such importance, it is our understanding of the teaching of this Court that neither the freedom of the work nor the liberty of the work's publisher or distributor can properly be denied; the matter cannot Constitutionally be submitted to the "prurient interest" and "patently offensive" tests prescribed in *Roth* and *Manual Enterprises* for the regulation of the worthless and obscene.⁶

Any other application of *Roth* and *Manual Enterprises* places in obvious danger of destruction—not

⁶ It is suggested that under *Roth*, in any criminal or other case involving a charge of *publicly* disseminating "obscene" literature, the prosecution ought to be charged with demonstrating (1) that the material has utterly no redeeming importance, failing which the case should be dismissed. Only after there has been a showing that the material involved is worthless should the issues be considered by the judge or jury whether (2) the material goes *substantially* beyond contemporary limits of candor and decency and (3) the matter's predominant appeal is to the prurient interest of average persons. In any case, where a defendant can show at the outset of the proceeding that the material challenged has some importance the case should be required forthwith to be dismissed. Otherwise, the very instigation of such proceedings operates to restrain distribution of literature having importance. See *Jacobellis v. Ohio*, *supra*, at 191.

only *EROS* and other material of like importance, but this nation's, even the world's, most important literature, science and art—in any case where these might find as their prime concern, sex, and the wheels of the machinery for criminal prosecution can be made to grind against persons publishing them.⁷ It must have been, for it was stated to be, the design of *Roth* and cases which followed it, not to shut the door upon literary, artistic, scientific or any other method for discussing and exploring sex—"a subject of absorbing interest to mankind through the ages"—but rather to open it wide as possible short of "encroachment upon more important interests" such, it may be, as are essential to the maintenance of the public peace and basic social order.⁸ It must, in any event, continue to be

⁷ Prosecutions for obscenity of the nation's literary vendors involve a broadspread censorship. Unwilling or unable to confine such prosecutions to works empty of artistic or instructive importance, state and federal officials have suppressed or punished the circulation of works expressing ideas having much, as well as small, artistic or instructive importance. (See de Grazia, *Obscenity and the Mail*, 20 Law & Contemp. 615 (1955); Ernst and Lindey, *The Censor Marches On* (1940); Lockhart & McClure, *Literature, The Law Of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, at 334-374 (1954)). The success of public prosecutors is many times magnified by extralegal work of national and local civic, religious and political groups, at times in cooperation with police and censorship "boards", often by use of extensive lists of "objectionable" authors and titles. (See *Bantom Books v. Sullivan*, 372 U.S. 58 (1963); Lockhart & McClure, *Literature, The Law of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, at 302-320; Larrabee, *The Cultural Context of Sex Censorship*, 20 Law & Contemp. 672 (1955)).

⁸ As indicated in *Roth* and earlier cases, freedom for the expression of ideas having artistic or instructive importance is not absolute but may be excluded from the ambit of Constitutional protection if it encroaches upon the limited area of "more important interests". The representative cases noted in *Roth* at footnote 14 hold those "more important interests" are only such as justify

Roth's path, following *Jacobellis*, to eschew exposing literature or art having even the slightest claim to importance, to the ravages of the "average" person's ambivalence concerning sex.⁹

EROS discussed and explored sex in literary, artistic and scientific forms and manners. In doing this, it manifested considerable importance and cannot be counted obscene.

II.

The trial judge found "the only overriding theme of *EROS* to be the advocacy of complete sexual expression of whatever sort and manner" (JA 363). The court of appeals seems to have agreed. Were the accuracy of this description of the purpose of *EROS* conceded, it seems plain that this proposition argues to free the publication, not condemn it. As sex is rec-

exclusion either: because the expression is used in such circumstances and is of such a nature as to create "a clear and present danger" that it will bring about a "substantive evil" which the state has a right to prevent (*Schenk v. United States*, 249 U.S. 47 (1919)); or because the state interest involved is important and is not directed at and does not infringe upon the content of the expression but rather upon the means whereby, (*Breard v. Alexandria*, 341 U.S. 642 (1951); *Teamsters Union v. Hanke*, 339 U.S. 470 (1950); *Kovacs v. Cooper*, 336 U.S. 77 (1949)) or place whereat, (*Cox v. New Hampshire*, 312 U.S. 569 (1941)) or conditions whereunder (*Prince v. Massachusetts*, 321 U.S. 158 (1944)) they may be expressed; or because a "balancing" of the contending interests persuades that the expression's must give way before the state's (*United States v. Harriss*, 347 U.S. 612 (1954)). The federal government's, like a state's, "interest" in purifying sexual thought or morality is non-existent. No power of this kind was bestowed on government by the Constitution which instead ordained that the individual's freedom in this area was inviolate. Thus, the incapacitations of state power with reference to speech, press and religion.

⁹ See footnote 6, *supra*.

ognized by this Court to be "one of the vital problems of human interest and public concern" about which a protected circle of freedom of expression must be drawn, so must any journal advocating the abandonment of restraints with regard to sex be protected.¹⁰ Thus, as it were, on the trial court's own admission, and the court of appeals concurrence, *EROS* is entitled to free expression.

III.

If the Court could not act under *Roth* to set aside the convictions on all counts below, and liberate *EROS* to the only Constitutionally valid arena for its trial—a "free and open encounter" in the American literary marketplace of ideas, where "all the winds of doctrine" can sift their strength, their purity, their artfulness, their righteousness—then *Roth* should be reconsidered. And if it be reconsidered, this should be to inquire whether the federal government has any "substantive power" to police sexual expression or morality in the mails¹¹ and whether the federal statute involved can be Constitutionally construed to reach

¹⁰ Such "advocacy" may be distinguished from "incitements" to sexual acts validly made criminal by statute—concerning which, it may be, the same rights of free expression would not exist. Consult "Text of Public Statement issued on May 28, 1962 based on Board of Directors action of April 16, 1962" contained in: "Obscenity and Censorship: Two Statements of the American Civil Liberties Union" (March, 1963).

¹¹ One may agree with Mr. Justice Harlan's protest in *Roth* that the federal government has "no business . . . to bar the sale of books because they might lead to any kind of 'thoughts'", without being able also to agree that a double-standard of freedom can be applied to publishers—depending upon whether it is a state or federal agency acting to police sexual thoughts and expression. The desirable prerogative of the state to experiment

any sexual literature or expression which is not disseminated in such a way as to constitute an actual incitement to crime.

Perhaps publishers and distributors of works like those involved in this case cannot have "carte blanche" to disseminate ideas under all circumstances and every condition. It may be that a statute could be designed and validly be directed against the dissemination of opinions, images or ideas under circumstances where it might have been known or predicated that sexual violence, criminal behavior, social disorder, or grave psychological injury would result.¹² Or under conditions of so cogent an idea, so artfully expressed, that a touch upon some extraordinarily sensitive fiber in the community's bundle of sexual nerves would threaten collapse of the bundle. It may be. But such

with social controls must stop short of abridgements of individual Constitutional rights. And State and local censors must not be encouraged, as they will be, by strengthening the postal powers over expression. If freedom to read is a right protected by the First Amendment (*Smith v. California, supra*, at 153) it must be a right for all citizens and irrespective of the State in which they reside. The States must be forbidden from abridging this right, as they are forbidden uniformly from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution*, Vol. II at 1094-5 (1953); Compare: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 19 (1960), note 28 at 110-114.

¹² In doing so, the state would doubtless need to consider the implications of such studies as Kinsey's *Sexual Behavior in the Human Male* (1948) and the *Report of the Committee on Forensic Psychiatry* of the Group for the Advancement of Psychiatry (No. 9, Rev. 1950) which, among other things, suggests that "absolute (sexual) law enforcement would perforce touch about 95% of the total male population." See also Kronhausen, *Pornography and the Law* (1959) at 155 ff.

conditions and circumstances have nothing in common with those summoned by this statute and this prosecution against petitioners here.

IV.

In addition to the specific issues of record in this case, addressed above, there may be a larger if largely undocumented question posed: May the federal postal obscenity powers Constitutionally be used to abort new publishing ventures, not by intercepting the mail, or by threatening or acting to impound, but by placing a publisher so far in fear of spending a good part of his remaining life in jail that he ceases publication.¹³ This case demonstrates how enforcement of a criminal obscenity statute can serve to censor as effectively as any known method of prior restraint.¹⁴ Since the incep-

¹³ Following his indictment and prosecution and cessation of his publication of *EROS* and *Liaison*, Mr. Ginzburg commenced publication of another periodical *FACT*.

¹⁴ "Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene, a person threatened with prosecution if he mails (or otherwise sends in interstate commerce) almost any book which deals in an unconventional, unorthodox, manner about sex, may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion. A statute would be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike. Yet, a federal prosecutor, under the federal obscenity statute,

tion of the case against petitioner Ralph Ginzburg, there has been no *EROS*. This criminal prosecution sentenced that magazine to death. It is urged to be a Constitutional duty of this Court to set aside that death sentence.

"Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail these few the community may appear to have suffered nothing. The appearance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight."¹⁵ Frank J. concurring in *United States v. Roth, supra*, Appendix at 825.

approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrarily. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects. In that way, the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment." Frank, J., concurring in *United States v. Roth*, 237 F. 2d 796 (C.A. 2d, 1956)—Appendix at 820-822.

¹⁵ "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard." Jackson, *The Federal Prosecutor*, 24 Jour. Am. Jud. Soc. (1940).

CONCLUSION

Since we believe the convictions below and the appellate action which sustained them to have been imposed in dereliction of Constitutional rights of free expression; and believe further that if those convictions are not set aside, the postal powers over expression will be strengthened and the powers of State and local censors everywhere will be encouraged; and since we believe finally that unless the sentences of fine and imprisonment imposed below are nullified, we will have only a diminutive freedom of expression in this country—and that there will result a general silencing of bold expression on sexual matters from authors, publishers and distributors who are not foolhardy enough to enter into *mock* combat with the average man's "prurient interest", when the latter's arms include a *real* possibility of heavy fines and imprisonment—believing all these things, we urgently ask this Court to grant the *writ of certiorari*.¹⁶

Respectfully submitted,

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¹⁶ The writ seeks review of the judgments below affecting *The Housewife's Handbook on Selective Promiscuity* and *Liaison* as well as *EROS*.

The *Handbook* is a work, distributed by Petitioner, whose claim to importance (and thereby to Constitutional protection), upon independent review by this Court, may not be deniable. It appears to be a serious book, mostly about sex, evidently autobiographical, written by a woman who testified concerning the importance for her, and hopefully for others like her, of the ideas and attitudes toward sex and woman's sexual "rights", which got candidly expressed in her book. (J.A. 226-227). Evidence of the

Handbook's possible instructive importance for doctors and psychologists as well, was also presented below. (J.A. 216-217; 225-226, 262 and 289.) Under such circumstances, and regardless of the indifference or unimportance with which others may have regarded it, this book's circulation might seem to be entitled to full protection. For here, as elsewhere in the long struggle for freedom of expression, whether a work's ideas, its "message" are harkened to by a majority or a minority, found important by many or only a few—the ideas are, the "message" nonetheless would seem to be entitled to be tested under Constitutional conditions of freedom. To paraphrase John Stuart Mill, "If all mankind minus *Mrs. Serett* were of one opinion, and only *Mrs. Serett* were of the contrary opinion, mankind would be no more justified in silencing *Mrs. Serett* than *she*, if *she* had the power, would be justified in silencing mankind." (*On Liberty*). Compare *Mrs. Mary Ware Dennett's The Sex Side of Life*, held not obscene in a landmark case, *United States v. Dennett*, 39 F. 2d 564 (2d Cir., 1930); and Marie C. Stopes' books *Married Love* and *Contraception*, both ruled not obscene: *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S.D.N.Y., 1931); *United States v. One Book Entitled "Contraception"*, 51 F. 2d 525 (S.D.N.Y., 1931).

Liaison appears to be a kind of newsletter on sex, the first of whose issues was admitted by Petitioner's own witness to be "tasteless, vulgar and repulsive" (J.A. 237). There was, however, testimony by the same witness that succeeding issues avoided that fault and evidence by him, and from other sources, showing that the newsletter was "within the limits of sexual discussion that we see in other works and material that is freely circulated within the United States". (J.A. 237.) Equally important, the trial judge who concluded *Liaison* was obscene under the *Roth* and *Manual Enterprises* tests, also considered the issue in question to have advocated a sort of idea—namely, "the complete abandon of any restraint with regard to any form of sexual expression". (J.A. 362.) An independent examination by this Court of the magazine taken as a whole—so as to include other issues—might very well lead to a conclusion that the magazine was not "utterly without any redeeming social importance". See *Jacobellis v. Ohio*, *supra*.

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IN THE
Supreme Court of the United States
October Term, 1964

No. 

42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER,
INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States

October Term, 1964

No. 807

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

I

We respectfully submit that the Petition should be granted because as Mr. Justice Brennan emphasized in *Jacobellis v. Ohio*, 378 U.S. 184:

“ . . . the question whether a particular work is obscene necessarily implicates an issue of constitu-

tional law . . . Such an issue we think must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' " (at p. 188).

In *Jacobellis*, Mr. Justice Brennan also said:

" . . . Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (at p. 190).

II

Petitioners were entitled to have each publication judged solely on the basis of its contents under the standards laid down by this Court. However, it would appear from the opinion of the Court of Appeals that other factors were considered and may have had some part in the judgment of the works involved. We submit that such other factors should not have been considered. The fact that the Petitioners were motivated by a desire to collect profits from their publications does not make the publications any more or less obscene (338 F. 2d 12, 15). Nor were they made any more or less obscene by the Petitioners' predilection for selecting unusual mailing addresses or by the standards which they used in choosing an editor (338 F. 2d at p. 13).

Consideration of these extraneous circumstances obviously increased the distaste with which the Court of Appeals viewed the Petitioners and their activities and may

to some extent have influenced its judgment on the sole question—whether the publications on trial were obscene under the standards laid down by this Court.

III

In *Jacobellis*, Mr. Justice Brennan said, “. . . a work cannot be proscribed unless it is ‘utterly’ without social importance” (378 U.S. at p. 191). It would appear that the petitioners’ publications were judged by a much more restrictive standard than this. The Court of Appeals apparently felt that only “authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of the work” are in the category of works that have sufficient redeeming social importance in a case where obscenity is charged (338 F. 2d at p. 15). We respectfully submit that this test is contrary to the standards laid down by the Court in *Roth* and *Jacobellis*.

IV

We respectfully submit that any statute punishing the publication of books or magazines on the ground of “obscenity” is an unconstitutional restraint on the rights of free speech and press guaranteed by the First Amendment, and should be condemned for the reasons stated by Mr. Justice Douglas and Mr. Justice Black, dissenting in *Roth v. United States*, 354 U.S. 476, 508.

V

The possibility that an author or publisher can be tried and imprisoned for publishing “obscene” material is in it-

self a deterrent on the rights of free speech and press. The risk of trial, with its expense and other hardships, is a formidable deterrent (although the author or publisher may ultimately be rescued by this Court).

The deterrent effect of an obscenity statute is increased by the impossibility of determining where the line will be drawn. In *Jacobellis*, Mr. Justice Stewart said that "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard core pornography," but he went on to say:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." (378 U.S. at p. 197).

If members of the Court have this difficulty, and can be divided in their opinions as to what constitutes an obscene publication, the uncertainty for individual authors and publishers is even more difficult.

We respectfully submit that the restraint on free press of a criminal obscenity statute should at least be limited to situations in which a publisher has invaded the right of privacy of members of the public and forced obscene material on them, under circumstances where they have no opportunity to accept or reject it.

But, where a publisher distributes a book or magazine to readers who are free to decide whether they will accept it or reject it, read it or not read it, then, we submit, the Federal Government should not interfere with the right

of the publisher to publish or the reader to read. In these circumstances the "absolute" guarantees of the First Amendment can be and should be retained for the benefit of authors, publishers and readers.

Here, there is no evidence that petitioners forced their publications on defenseless readers. Advertisements, which were admittedly not obscene, were mailed to potential customers, but the publications themselves were only mailed to those who ordered them.

For these reasons, we respectfully submit that the Petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 807

**RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT***

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pct. App. 1a-10a) is reported at 338 F.2d 12. The opinion of the district court (JA 354a-368a)¹ is reported at 224 F.Supp. 129.

¹ "JA" refers to the joint appendix prepared for the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1964. On November 27, 1964, Mr. Justice Brennan granted an extension of time to file a petition for a writ of certiorari to January 5, 1965. The petition was filed on January 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly found the materials at issue to be obscene.
2. Whether there were procedural defects affecting the judgment.

STATUTE INVOLVED

The pertinent portions of Section 1461 of Title 18 are set forth in the appendix to the petition at pages 10a-11a.

STATEMENT

Having waived trial by jury (JA 2a), petitioners were tried and convicted of violating 18 U.S.C. 1461. Petitioner Documentary Books, Inc., was convicted on six counts of having caused the mailing of an obscene book, namely *The Housewife's Handbook on Selective Promiscuity* (hereinafter called *The Handbook*), and three counts of having caused the mailing of advertisements telling where the book could be obtained. Petitioner Liaison News Letter, Inc., was convicted of six counts of having caused the mailing of an

obscene pamphlet, namely *Liaison*, Vol. 1, No. 1 (hereinafter called *Liaison*) and three counts of having caused the mailing of advertisements telling where the pamphlet could be obtained. Petitioner Eros Magazine Inc. was convicted of six counts of having caused the mailing of an obscene magazine, namely *Eros*, Vol. 1, No. 4 (hereinafter called *Eros*) and four counts of having caused the mailing of advertisements telling where the magazine could be obtained. Petitioner Ginzburg was convicted of all twenty-eight of the foregoing counts (JA 2a-3a, 6a-13a). Petitioner Eros Magazine, Inc., was fined a total of \$5,000, and each of the other corporate petitioners a total of \$4,500. Petitioner Ginzburg was fined a total of \$28,000 (\$1,000 on each count) and sentenced to a total of five years' imprisonment. Three years of his sentence was based upon counts involving *The Handbook* and two years upon counts involving *Eros* (JA 4a-5a).

The verdict of guilty was entered on June 14, 1963 (JA 2a).² On August 6, 1963, the court filed special findings of fact (JA 3a). The court found, as to *The Handbook*, that it is "a vivid, explicit and detailed account of a woman's sexual experiences * * * which goes substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" (# 5); that it is "patently offensive on its

² It was stipulated that petitioners caused the mailing of the three works and of the advertisements pertaining to them with knowledge of the contents of the works and the advertisements (JA 149a-150a).

face" (# 7); that it "appeals predominantly, taken as a whole, to prurient interest" (# 6); and that it "has not the slightest redeeming social, artistic or literary importance or value" (# 9). As to *Liaison*, the court found that it "primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest" (# 12); that it is "patently offensive on its face" (# 14) and "goes beyond customary limits of candor, exceeding contemporary standards in description and representation of the matters described therein" (# 11); and that it "has not the slightest redeeming social, artistic or literary importance or value" (# 13). As to *Eros*, the court found that "[w]hile portions * * * are taken from other works and may have literary merit in context," the magazine "appeals predominantly, taken [as] a whole, to prurient interest" (# 16) and "has not the slightest redeeming social, artistic or literary importance or value taken as a whole" (# 19). In conclusion, the court found, as to all three works, that they "are devoid of theme or ideas" and "are all dirt for dirt's sake and dirt for money's sake" (JA 351a-353a).

Petitioners introduced various witnesses (a psychologist, a psychiatrist, a literary critic, an art critic, and a minister "trained and experienced in clinical psychology") who testified in general that the three works do not appeal to prurient interest (as they defined the term), have literary, artistic or scientific value, and do not go substantially beyond community standards. Additionally, they introduced books and magazines purchased at various newsstands to show

that they were more offensive than the works at issue, and offered testimony by the author of *The Handbook* as to its factual character, her purpose in writing it, and her own prior mailing of copies of it. The government introduced no evidence other than the material itself in its direct case, but offered three witnesses in rebuttal (see Pet. 5-12).

ARGUMENT

As shown by its special findings of facts, the trial court, in characterizing the three works here at issue as obscene, scrupulously sought to apply the test laid down by this Court for determining obscenity. *Roth v. United States*, 354 U.S. 476, 489; see, also, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482, 486 (Harlan and Stewart, JJ.); *Jacobellis v. Ohio*, 378 U.S. 18, 191-192 (Brennan and Goldberg, JJ.). The only question in this case, therefore, is whether the district court's ultimate finding, unanimously approved by the court of appeals, was a permissible one. See *Jacobellis v. Ohio*, *supra*, 378 U.S. at 190; *Manual Enterprises v. Day*, *supra*, 370 U.S. at 488; *Roth v. United States*, *supra*, 354 U.S. at 497 (Harlan, J., concurring in part, dissenting in part). The Court has the relevant works before it and if it deems that course appropriate, can re-examine the material for itself. See *Manual Enterprises v. Day*, *supra*, 370 U.S. at 488. Indeed, since no amount of argumentation could serve effectively as a substitute for such an examination, we confine ourselves to the proposition that the test applied by the courts below is

in full accord with the standards set forth by this Court.

1. The test adopted in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). The courts below proceeded to answer this question. To give meaning to the term "prurient interest," they turned to the definitions which are set out in the *Roth* opinion (354 U.S. at 487, n. 20) and to the definitions of obscenity which appear in the cases which that opinion cites (354 U.S. at 489, n. 26).³ In short, they treated the relevant question as whether the dominant theme and appeal of the book would be a morbid and shameful preoccupation with sex.⁴ They understood that the trier of fact—judge or jury—must decide this question by reference to the general standards of the national community—not in terms of personal predilec-

³ *E.g.*, *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y.) ; *Adams Theatre Co. v. Keenan*, 96 A.2d 519, 521, 12 N.J. 267 (S.Ct. N.J.) ; *Commonwealth v. Gordon*, 66 D.&C. 101, 136, 151 (Q.S., Phila. Cty. Pa.) ; *American Civil Liberties Union v. The City of Chicago*, 121 N.E.2d 585, 592, 3 Ill.2d 334 (S.Ct.Ill.) ; *Commonwealth v. Feigenbaum*, 70 A.2d 389, 390, 166 Pa.Super. 120 (Super.Ct., Pa.) ; *United States v. Levine*, 83 F.2d 156, 158 (C.A. 2) ; *Commonwealth v. Isenstadt*, 62 N.E.2d 840, 847 (S.Jud.Ct., Mass.).

⁴ The district court found that the works herein appeal "to prurient interest of the average adult reader in a shameful and morbid manner" (#6, *The Handbook*, and #16, *Eros*) and "to prurient interest of the average individual" (#12, *Liaison*), and that they create "a sense of shock, disgust and shame in the average adult reader" (#8, 15 and 18) (JA 352-353a).

tions—and that a work can not be considered obscene unless it goes substantially beyond contemporary standards of permissible candor.

In applying this test, the courts also understood and acted upon the proposition that the ultimate issue of obscenity concerns the overall theme of the work. They looked to the intended impact of the material taken as a whole, using the word "intent" in the sense that it is used to refer to the intent of a statute. There is no suggestion that they believed that their task was to balance the social importance of the work against the degree of prurient appeal and then decide whether the work's importance was sufficient to justify its erotic passages. Regardless of the work's lack of social importance, the courts realized that its dissemination was forbidden only if an appeal to the prurient interest was its dominant theme.

It is true that there was opinion evidence offered by petitioners' witnesses intended to show that the works did not go substantially beyond contemporary standards of candor, and that they had some social importance. However, the ultimate determination of obscenity, as the courts below held, must be made by the courts and not by expert witnesses. Cf. *United States v. Kennerley*, 209 Fed. 119, 121 (S.D. N.Y., Judge Learned Hand). With regard to community standards, the most that has ever been claimed is that a defendant has a right to "enlighten" the trier of facts as to community standards. See *Smith v. California*, 361 U.S. 147, 165 (Frankfurter, J. concurring), 172 (Harlan, J. concurring). It has never been held that the trier is bound by the partic-

ular evidence offered. See *Kahm v. United States*, 300 F. 2d 73 (C.A. 5), certiorari denied, 369 U.S. 859. Similarly, defendant's introduction of opinion testimony cannot establish conclusively that a work has any redeeming literary or scientific theme. On both issues the courts below specifically rejected the witnesses' opinions after considering both the expert testimony and the works themselves.

In this Court, the petitioners urge particularly that *Eros* and *The Handbook* were not wholly devoid of literary and scientific merit. As we have indicated above, this issue can only be decided by the court's consideration of the works themselves. We note only that even if works have, to some comparatively slight extent, a literary or scientific interest, this does not, in our view, immunize them from attack as obscene. There are few works so flooded in every last line and detail with prurient appeal that no claim can be made that they appeal, at least interstitially, to some other interest. The very reference in *Roth* to the "dominant" theme of the work indicates a recognition that there may be minor or subservient themes which do not immunize from prosecution a patent attempt to appeal to the prurient interest of readers. It is only if the presence of other themes casts doubt upon the dominance of prurience as the intended appeal and overriding interest of the work that the publication is constitutionally protected. Where the predominant theme is a patently offensive appeal to an unwholesome and shameful preoccupation with sex, the work is obscene even if it may also be of

some comparatively slight literary or scientific interest.

Finally, there is little to be gained by petitioners' suggestion that the concept "hard-core" pornography should be substituted for that of obscenity as the relevant constitutional test (Pet. 15-16). A change in labels would not make the underlying issues of policy more malleable. *Jacobellis v. Ohio*, *supra*, 378 U.S. at 201 (Warren, C.J. dissenting). For example *Zeitlin v. Arnebergh*, 383 P. 2d 152, 59 Cal. 2d 901, 31 Cal. Rptr. 800, which petitioners cite (Pet. 15), does hold that only hard-core pornography can be reached constitutionally by obscenity statutes. 383 P. 2d at 160-162. But, under its use of that term, material which would be obscene under the *Roth* test, as we understand it, would also meet the definition of hard-core pornography. *Id.* at 163. As for petitioners' suggestion of unconstitutional vagueness, this Court held in *Roth* that where the relevant statutes are applied in accordance with the test there enunciated, they are constitutionally precise. 354 U.S. at 491-492. We see no compelling reason for reconsideration of the established test or any need for plenary review of an *ad hoc* determination in which all of the judges below have concurred.

2. Petitioners' claims of procedural errors at the trial were properly rejected by the court of appeals.

a. Petitioners' complaint concerning the trial court's delay in making special findings is, as the court of appeals stated (Pet. App. 7a), without substance. Essentially the only "finding" that can be made is that the works are obscene under the rele-

vant test. Having made this finding of ultimate fact or law in its general verdict, the court was free to take some time to make explicit the particular basis of its general ruling.

b. Irrelevant evidence can, of course, be admitted in a trial without a jury, as long as the court does not base its decision upon it. The purpose of the relevancy rule is to prevent confusion to jurors. See *Shepard v. United States*, 290 U.S. 96, 104; 1 *Wigmore on Evidence*, § 28, pp. 409-410 (3d ed. 1940). There was thus no reason to reverse the decision of the district court simply because it heard irrelevant testimony concerning the effect of the challenged material upon adolescents, introduced in rebuttal of the petitioners' evidence of the therapeutic uses of this material. Unlike *Volanski v. United States*, 246 F. 2d 842 (C.A. 6), it is entirely clear from reading the trial court's findings and opinion here that it based its judgment solely upon application of the *Roth* test, and that the effect of the challenged material upon adolescents was something which the court noted only by way of explanation of its rejection of the tendered defense of *The Handbook* as therapeutic (JA 366a; 224 F. Supp. at 136).

c. "Scienter" in an obscenity prosecution is established upon a showing that the accused had knowledge or notice of the contents of the challenged work. *Rosen v. United States*, 161 U.S. 29, 41-42; *Price v. United States*, 165 U.S. 311; *Roth v. United States*, *supra*, 354 U.S. at 491, n. 28; *Kahm v. United States*, *supra*, 300 F. 2d at 86; *United States v. Oakley*, 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368

U.S. 888. It was stipulated that all of the petitioners knew the contents of the works here at issue. Accordingly, there is no need to consider whether additional evidence of intent is shown by petitioners' efforts to mail their material from selected post offices (*i.e.*, at Blue Ball, Pa.; Intercourse, Pa.; and Middlesex, N.J.). Moreover there is no basis in the trial court's findings for a contention that commercial exploitation was considered an element of the obscenity of any of the challenged works.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES OF AMERICA, *Respondent.*

REPLY FOR PETITIONERS

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UNITED STATES OF AMERICA, *Respondent.*

REPLY FOR PETITIONERS

1. Relying on “findings” submitted *ex parte* by the Government to support a guilty verdict entered 54 days earlier (Res. Br. 3-4),¹ the United States argues that the trial court “scrupulously sought to apply” this Court’s test for determining obscenity (Res. Br. 5) and that, in deference to such findings, it is unnecessary

¹ Despite petitioners’ timely request for “special findings” under Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348), the trial court delegated its fact-finding function to the prosecutor (JA 349).

to examine the challenged publications, much less examine them "in the light of the record made in the trial court." *Jacobellis v. Ohio*, 378 U.S. 184, 196 (Brennan and Goldberg, JJ.) (Res. Br. 5, 8). The findings on which the Government relies are not entitled to such deference. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657. They are, in addition, insufficient to support a conviction of petitioners as to *Eros* and *Liaison* (Pet. 23).² Furthermore, the objectionable manner in which they were made is a separate ground for reversing all the convictions (Pet. 12-13, 21-23).

² Although patent offensiveness must *conjoin* with prurient interest appeal "before challenged material can be found 'obscene' under § 1461", *Manual Enterprises v. Day*, 370 U.S. 478, 486 (Harlan and Stewart, JJ.), the trial court failed to find that *Eros* was either patently offensive or that it substantially exceeded customary limits of candor in describing or representing nudity or sex (JA 353). By contrast, the trial court found that both the *Handbook* and *Liaison* went "substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" (JA 352) and were "patently offensive on [their] face" (JA 352, 353). The trial court's failure to find that *Eros* was patently offensive or, in other words, that it substantially exceeded customary limits of candor, is of itself sufficient to require a reversal as to *Eros*. *Manual Enterprises v. Day*, *supra*. The *Liaison* convictions must also be reversed. While the trial court found that *Liaison* was "published for the purpose of appealing to the prurient interest of the average individual" (JA 352) it did *not* find that *Liaison* had any prurient interest appeal in fact. Inasmuch as the trial court specifically found that both *Eros* (JA 353) and the *Handbook* (JA 352) did appeal to prurient interest, the omission in the case of *Liaison* is fatal. The trial court's attempt to supply these omissions in an opinion (JA 362, 367), filed three and one-half months later, came too late. This Court is "not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings". *Stone v. United States*, 164 U.S. 380, 383; *Saltonstall v. Birtwell*, 150 U.S. 417, 419.

Although the Government does not dispute our contention (Pet. 17-18) that a work having redeeming social importance is constitutionally protected, it asserts that "opinion testimony cannot establish conclusively that a work has any redeeming literary or scientific [importance]" (Res. Br. 8).⁸ While we agree with this statement as an abstract proposition, it is not for defendants to establish *anything* in a criminal case—much less "conclusively". Indeed, the Government's burden is especially heavy in a case affecting First Amendment rights. *Scales v. United States*, 367 U.S. 203, 232; *Noto v. United States*, 367 U.S. 290, 291; cf. *Freedman v. Maryland*, — U.S. —, 33 L.W. 4211, 4213. And when the record made in the trial court is weighed against this standard, or any constitutionally permissible test, none of the challenged publications is obscene (Pet. 16-18).

2. The United States argues, on the one hand, that the courts below did not balance away the social importance of *Eros* and the *Handbook* against their alleged prurient interest appeal (Res. Br. 7), and, on the other hand, that where, as here, the courts found that the predominant theme of the challenged publications was an appeal to prurient interest, the works were properly held obscene despite a "comparatively slight literary or scientific interest" (Res. Br. 8-9). These contrary assertions are a direct outgrowth of the Government's unsuccessful attempt to square the result below with *Jacobellis v. Ohio*, 378 U.S. 184, 191

⁸ The evidence on redeeming social importance of the *Handbook* was not limited to "opinion evidence." Mrs. Serett testified that the book had been sold to physicians and other professionals (Pet. 9), a fact subsequently admitted by the Government (JA 370). Rev. Von Hilsheimer testified that he and a colleague had found the book "a useful tool" (JA 289).

(Brennan and Goldberg, JJ.), while at the same time retreating to an interpretation of *Roth v. United States*, 354 U.S. 476, which *Jacobellis* discredited. Respondent pinpoints this dilemma when it seeks rejection of the "hard core" pornography test petitioners urge this Court to adopt (Pet. 15-16). For, in arguing that a change in labels would not make the "obscenity" problem more solvable and that the "hard core" pornography and *Roth* tests are really coextensive (Res. Br. 9), respondent ignores the fact that *Eros* was held obscene despite the Government's explicit concession that it was not "hard core" pornography (JA 349).

The resulting inter-circuit conflict to which we previously pointed (Pet. 15) has now become sharper and more widespread. Subsequent to the filing of the instant petition, the Court of Appeals for the Tenth Circuit in *Haldeman v. United States*, 340 F. 2d 59, 62, held that "published materials are obscene in a constitutional sense only when they are within the area of 'hard core pornography' * * *". If the *Roth* test encompasses only "hard core" pornography, as that term is defined in cases such as *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, this Court should grant certiorari and say so. On that basis, petitioners' convictions must be reversed. None of the challenged publications is "hard core" pornography and, in the case of *Eros*, that is admitted.

3. The Government brushes aside the trial court's violation of the requirements of Rule 23(c) of the Federal Rules of Criminal Procedure on the ground that the only finding the trial court was required to make was a finding that the challenged works were obscene under the relevant test and that that finding is implicit in the general verdict (Res. Br. 9-10). By substituting

in place of "special findings" a presumption that such findings are implicit in every guilty verdict, the Government would read Rule 23(c) out of the Federal Rules of Criminal Procedure.⁴

Special findings under Rule 23(c) serve much the same function in a non-jury case as instructions do in a jury case. *United States v. Palermo*, 259 F. 2d 872, 882 (C.A. 3, 1958). Just as a jury must apply the proper legal standards in arriving at its verdict, so must a trial judge in arriving at his verdict. *Wilson v. United States*, 250 F. 2d 312, 324 (C.A. 9, 1957). And just as a trial judge cannot instruct the jury after it returns its verdict, so a trial judge cannot instruct himself after he returns his verdict. Indeed, if a trial judge is allowed to render a verdict based upon a visceral reaction buttressed later by "facts" and "conclusions", special findings would be meaningless. *United States v. Forness*, 125 F. 2d 928, 942-943 (C.A. 2, 1942). Since, in this case, the findings were prepared by the prosecutor and submitted to the trial court *ex parte*, such findings were worse than meaningless. They deprived petitioners of every safeguard Rule 23(c) was designed to afford (Pet. 21-23).

4. While agreeing that the admission of the Frignito testimony concerning the effect of the *Handbook* on adolescents was improper, respondent urges that its non-prejudicial use "is entirely clear from reading the trial court's findings and opinions" (Res. Br. 10).

⁴ If the trial court had made the required findings contemporaneous with the issuance of its general verdict, petitioners would have been able to file a timely motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the ground that the findings were inadequate to support conviction. See discussion, *supra* at fn. 2.

However, since the trial court's opinion specifically refers to the *Handbook's* effect upon adolescents (JA 366), it is plain here, as in *Volanski v. United States*, 246 F. 2d 842 (C.A. 6, 1957), that the "court [did] base its decision upon it" (Res. Br. 10). Moreover, one cannot determine from the findings in this case what elements entered into the trial judge's guilty verdict made fifty-four days earlier. Therefore, one must look to what the trial judge ruled or said during the trial to determine on what basis he found petitioners guilty immediately upon the close of trial. In addition to the erroneous admission of the Frignito testimony (JA 321-324), the record shows that the trial judge was extremely concerned with the *Handbook's* effect on adolescents and that this was the principal subject on which he chose to interrogate witnesses (JA 271, 272, 296, 297-298, 300-307).⁵ Absence of prejudice does not "affirmatively appear" from this record. Prejudice does. Compare *Bihn v. United States*, 328 U.S. 633, 638; *Kotteakos v. United States*, 328 U.S. 750, 765.

5. One of the important questions still open under 18 U.S.C. § 1461 is whether the statute requires proof of a specific criminal intent, *i.e.*, an intent to pander to prurient interest (Pet. 21, fn. 22).⁶ If, as the Govern-

⁵ The trial judge's actions in this case are at least as revealing as the comments which demonstrated prejudice in *Volanski*. 246 F. 2d at 843, fn. 1.

⁶ Another important question concerns the meaning of the term "appeal to prurient interest" (Pet. 2, 16-17). Although the Government studiously avoids coming to grips with this issue here (Res. Br. 6), it asserts in a brief filed the same day, written by the same counsel (seeking affirmance of 25 and 15 years sentences meted out for the mailing of one book), that "appeal to prurient interest" "does not mean * * * that the actionable material must appeal to

ment now asserts, evidence of an intent to commercially exploit obscenity is irrelevant, because *scienter* is established by proof of mailing with knowledge of the contents (Res. Br. 10-11), *reliance* by the trial court on evidence of commercial exploitation requires reversal as to all petitioners. *Volanski v. United States*, 246 F. 2d 842, 843 (C.A. 6, 1957). If, on the other hand, evidence of a commercial pandering to prurient interest is essential, reversal must be had as to all petitioners except Eros Magazine, Inc. This is so because the district judge, following the Government's theory in the trial court,⁷ actually found that evidence of criminal intent, admissible only against Eros Magazine, Inc., proved criminal intent against *all* petitioners (Pet. 20).

In either event, unless certiorari is granted and the convictions below reversed, petitioners will have been tried and convicted on the theory that *scienter* involves a commercial pandering to prurient interest (JA 351, 353) and their convictions will have been affirmed on the theory that *scienter* is a mailing with knowledge of the contents (Pet. App. 8a-9a). This is a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 202;

the prurient interest of the average person" but rather that "it appeals to [what] the average person considers an unwholesome preoccupation with sex". (Brief for United States, *United States v. West Coast News Company, et al.* (C.A. 6), Nos. 15792-15795, pp. 32-33). This rejection of the *impact* or *effect* test for determining prurency, while unstated here, is nonetheless the position of the United States and, therefore, is a compelling reason for granting certiorari.

⁷ In the trial court, the theory of the prosecution was that petitioners were engaged in a general scheme and purpose to commercially exploit obscenity, and the trial court so found (JA 351, findings 3 and 4; JA 353).

Russell v. United States, 369 U.S. 749, 766, 768.⁸ Not only will petitioners be denied due process, but the result will have serious implications for the future. So long as Questions 6(a) and 6(b) (Pet. 3) remain unresolved, the Government will be free to introduce prejudicial evidence of this kind in criminal jury and non-jury cases alike and to assert on appeal that such evidence was extraneous to conviction and, therefore, harmless. The capacity for prejudice inherent in this approach is amply demonstrated by the opinion below (Pet. App. 1a-2a, 5a, 6a).

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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⁸ See also, *Wilson v. United States*, 250 F. 2d 312, 325; (C.A. 9, 1957); *Pearson v. United States*, 192 F. 2d 681, 693-694 (C.A. 6, 1951).

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IN THE
Supreme Court of the United States

October Term, 1964
No. 807

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF OF
LILLIAN MAXINE SERETT AS AMICUS
CURIAE.**

Lillian Maxine Serett, author of *The Housewife's Handbook on Selective Promiscuity*, one of the writings involved in the proceedings herein, by and through her counsel, respectfully requests permission to appear as *Amicus Curiae* and to file a brief in support of petitioner's position in the above entitled cause. Consent to the filing of a brief by this *Amicus* was given by counsel for the petitioner. A written request for such consent by counsel for the respondent has been made but, up to the present time, no reply has been received.

Counsel for Mrs. Serett has read the record at bar and has familiarized himself with the arguments presented by the parties therein, and believes there is further and

particular argument needed on behalf of the author of the Handbook. The book involved herein has been deemed "obscene" by the courts below and therefore without the protective guarantees of the Constitution of the United States. Freedom to an author means more than mere freedom of expression; it includes also the right of an author for a chance to be heard. Counsel is convinced that issues of great importance are presented in the cause herein. This issue has to do with the question of censorship, first, as it affects rights guaranteed to *Amicus* by the Constitution of the United States and, second, as it relates to the use of governmental power to impose a censorship on writings dealing with sex and sexual relations and behavior.

It is therefore respectfully requested that the movant be granted permission to file the within brief in support of petitioner's position.

Respectfully submitted,

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*Counsel for Lillian Maxine Serett,
Amicus Curiae.*

Of Counsel:

SAM ROSENWEIN.

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Respondent.

BRIEF OF LILLIAN MAXINE SERETT AS
AMICUS CURIAE.

ARGUMENT.

I.

The Book, *The Housewife's Handbook on Selective Promiscuity*, Is Entitled to the Protection of the First Amendment Guarantees of the Constitution of the United States.

1. Freedom of expression is, of course, embraced within the guarantees of the First Amendment; and this freedom hinges on the freedom to create and develop ideas. More than an individual right of expression, however, is contained in the guardian provisions of the Bill of Rights; the community's interest in ideas — the public's right to know — is imbedded in the constitutional liberties of speech and press.

Without freedom to discuss "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period" (*Thornhill v. Alabama*, 310 U.S. 88, 102, quoted in *Roth v. United States*, 354 U.S. 476, 488), a self-governing society appears destined for stagnation and decline. Societal issues cannot be resolved without the widest dissemination of points of view; the "thinking process of the community" is vitiated when "heretical" and "immoral" opinions are suppressed. Truth based solely on prevailing opinion is no more than superstition. In short, the guarantees of the First Amendment secure a public purpose as well as a private right.

In the ultimate sense, the social, economic and political problems of organized society resolve themselves into questions of human relations. The complexity of these relations, attested alike by philosophers, religious leaders, statesmen, social and physical scientists, arises out of the nature of man. "Man is an animal that thinks. To be a first-rate human being, a man must be both a first-rate animal and a first-rate thinker." Huxley, *On Art and Artists* (1960) 72. Man's contacts are not only with an outer world, but an inner world of instincts and impulses. It is important to recall, moreover, that in real life "Man" dissolves into an infinite variety of men and women, whose individual psyches are as different as their conscious spirits.

Neither coercion nor ignorance can forever clog the processes of change which take place in the social and psychological spheres frequented by human beings. The alteration of traditional beliefs and expectations, the changes in social, religious and moral codes, are merely

the outer manifestations of the urges of men and women for increasing freedom. The question is not whether there will be change; the challenge lies in avoiding the painful stresses and strains which arise when change is resisted by established institutions. It is in the American experience to meet this challenge by the exercise of reason, by freedom of thought and expression, by the broadest dissemination of information and knowledge. We are profoundly committed to "uninhibited, robust, and wide-open" discussion in the search for truth. *New York Times and Abernathy v. Sullivan*, 376 U.S. 254, 270.

The growth and development of human sexuality, the patterns of sex relations and sex behavior, have significant effect upon the social processes of the community. In matters of sex, there is a profound need for understanding, insight and awareness; yet in no other area has there been so much ignorance and obscurantism. It is impossible to estimate the social damage which has been done by the lack of rational, informed and responsible attitudes to sex.

"Sex, a great and mysterious force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Roth v. United States, 354 U.S. 476, 487.

How great a concern and interest there are in problems of sex may be discerned from the host of writings on sex, sex relations and sexual behavior appearing in such fields as medicine, biology, physiology, psychology, psychiatry, law, penology, literature, the arts, and many other areas.

The problems of sex are rooted in the sexual function, a function affected by biological, psychological and social factors which result in a marked diversity of sexual activities. These activities, so integral to the individual personality and the social organization, are a major concern to all mankind. See, Frank, *The Conduct of Sex* (1961 pbk). It follows that knowledge of the nature and character of sexual behavior must become available to the maximum number of persons.

"Most men and women and adolescent children, and even pre-adolescent children in their youngest years, face, at times, problems which some greater knowledge of sex would help solve. As in other areas of science, the restriction of sexual knowledge to a limited number of professionally trained persons, to physicians, to priests, or to those who can read Latin, has not sufficiently served the millions of boys and girls, men and women, who need such knowledge to guide them in their everyday affairs."

Kinsey, *Sexual Behavior in the Human Female* (1953) 11.

Nowhere is knowledge of sexual attitudes and sexual behavior more needed than in relation to the human female. For varied reasons, emanating from the patriarchal social organization prevailing at the inception of civilization, women have been compelled to occupy a subordinate status with respect to men. 15 *Encyclopaedia of the Social Sciences*, "Woman, Position in Society"; DeBeauvoir, *The Second Sex* (1953). Aristotle averred that men are by nature superior and therefore they are fit to rule, while women should be ruled. This notion continues to persist in all societal

organizations dominated by men. The result has been that women, who constitute numerically at least half of the human race, have never even essentially succeeded in obtaining equality in the social, political or occupational arenas. Rossi, *Equality Between the Sexes: An Immodest Proposal* in *Daedalus*, Journal of the American Academy of Arts and Sciences (Spring, 1964) 607-652.

This subordinate status of women has resulted in pervasive social wrongs, particularly in a tendency to debase and corrupt the sexual relations between men and women. The myths created by men with respect to women, and which women have in large part been compelled or persuaded to accept, has had unnatural and repressive influence on the sexual life of women. Havelock Ellis, *On Life and Sex* (1957 pbk) 71-78; Albert Ellis, *The American Sexual Tragedy* (1962 pbk). In the area of sex or any other area, it is plain that the "double standard" is no longer acceptable, if human social organization is to be maintained and the dignity and independence of the individual personality safeguarded. In the political, social and economic areas, the claims for equality by women are to some degree being understood. Recognition, however, has come far slower for the claims of women to sexual equality and independence. In order for new traditions and new attitudes to peacefully develop in a society swept by rapid technological and social changes, the human female must obtain a position of independence and equality with the male.

Unless woman obtains initially a knowledge of "her own complex self", and until men and women understand each other "as they are and not as they hope or imagine them to be", the attainment of equality of the

sexes cannot be achieved. Without the removal of long existing fictions and illusions, there is rather the potential danger of deteriorating sexual and social relations. Davis, *The Sexual Responsibility of Woman* (1964 pbk) 3; Kinsey, *Sexual Behavior in the Human Female* (1953) 567, *et seq.* Disastrous mistakes are occurring frequently in sexual relations which vitally affect social interests. The function of a well-ordered society is to see that these mistakes do not occur; it is self-defeating for a community to place every obstacle in the way of rectifying such mistakes. Intelligence and knowledge is needed, and such intelligence and knowledge cannot be obtained without first knowing one's self.

2. Lillian Maxine Serett has written a book of social importance. The Handbook is an attempt to furnish clarity and understanding about the biological, psychological and social elements involved in the fulfillment of woman's function as a complete human being. The author's frank and comprehensive autobiography is of value not only to women but to men as well. The writing helps to demolish many delusions and falsehoods about sexual relations between male and female. The writing is honest, humane and perceptive. The autobiography is a departure from the fantasy and idealized sexual world created by so many writers (see Brown, *Sex and the Single Girl*, and the motion picture based thereon); it compels a fair-minded reader to face up to the objective facts and real experiences involved in the sexual function and sexual behavior of the sexes. The book enlightens, and enlightenment is the source of forward social thought and attitudes.

The autobiography traces the experiences of the author from the age of 3 until the age of approximately

35. The author's origins were humble; her father died when she was 5 years old; her mother was compelled to work long hours; she was generally left with her grandparents. As a result, she appears to have been thrown upon her own resources during her pre-adolescent and adolescent periods. Nevertheless, we learn from the autobiography that she attended college at an early age, at first planning on obtaining a degree in mathematics but later deciding to be a teacher. She took courses in psychology and education. In the I. Q. tests, she was one of the top 5 (pp. 53-54). She took courses in child psychology, where her instructor spoke on the sexual relations of married persons, and the necessity for a woman not to let her husband know (in order to satisfy his male ego) that she was dissatisfied with her sexual life. She thought to herself:

"This kind of 'kindness' to a man would only lead to my thinking he was less than a man. And in the end it would turn out that it was not kind after all." (P. 55).

Throughout her three marriages, she found herself compelled to earn a livelihood to support her husbands and children. She worked in a shipyard as an electrician. Later, she built up a business in architectural drafting and acquired a fairly good income. Still later, she became employed in the publishing business. Thereafter, she acquired some training as a counselor and went into business with a local businessman. They founded an organization to teach personnel — efficiency courses and communication courses, and to do private counseling (p. 168). This business becoming unsuccessful, she began to

build up a printing business. Thereafter, she turned to writing, particularly the Handbook and the operation of a publishing and printing establishment.

In a preface to the Handbook, Dr. Albert Ellis states:

"In the most simple, lucid, down-to-earth, yet nonpornographic terms she has given us descriptions of a highly sexed woman's thoughts, feelings, and reactions — descriptions that are (as yet, alas) pricelessly rare. How she felt before engaging in sex activities; what her husbands or lovers said to her before, during, and after these sex acts; how she thought and felt in the midst of and subsequent to copulative engagements — these are the questions that Mrs. Anthony has chosen to consider and answer. And answer them fully, openly, and with startling insight, she most certainly has." (P. 8).

In a review of the Handbook, by Dr. William J. Bryan, Jr., it was stated that the writing was

"a brilliant and skillfully written autobiography of a woman who through her own searching analyses has been able largely to free herself from the guilt which permeates the great majority of American adult women (and to a lesser extent, men) on the subject of their sexual behavior. . . . The importance in the publication of this book as I see it lies, by and large, together with the importance of the Kinsey Report. That is to say, books like these show us not necessarily what the American female should do or should not do, but what she *is doing*." (JA 16-17).

In another review for the *Journal of Human Relations*, Dr. Frumkin stated that

"This book is a profound personal document, a social psychological autobiography, as well as a treatise on sex education. . . . It is a work inspired by lessons learned by human suffering, and inspired by and full of the love and warmth that sometimes are created in the most tragic and deleterious surroundings." (JA 18-19).

At the trial, Dr. Charles G. McCormick, a clinical psychologist with an extensive educational background (JA 186-187), testified that he had read the *Handbook*; that it gave a realistic picture of a woman's attitude and activities with respect to sex; that the writing was supported by a responsible attitude on the part of the author (JA 206, 210-211). The Reverend Hilsheimer, a pastor and spiritual counselor with broad education and practical experience (JA 273-277), testified that he had read the *Handbook* and used the work in his pastoral counseling and formal psychological counseling (JA 289). Reverend Hilsheimer stated that he had used the writing particularly in cases of married women as a means of reducing and ventilating their sense of shamefulness, their sense of debilitating guilt, and their sense of prurience which had developed out of their particular trainings and experiences. He stated:

"Now, it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which they live and the problems that they are going to face and to fit them with the practical, detailed,

immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'You are not alone. This is the experience of many, many people', and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. There is no sense of shame involved in it. There is no sense of prurience involved in it. There is no sense of wallowing in sexuality simply for its own sake but it is a simple, straightforward recount of a fairly unhappy history of a fairly typical woman, and I can say based on my clinical experience and the experience of my colleagues and the literature that this book is not drawn far from the average middle American experience whether involved with one or several partners." (JA 291-292).¹

The Handbook therefore is a valuable document, among other writings, in the continual developing studies of human sexual behavior and its basic causes. In dealing with problems of pre-marital and extra-marital relations, in pre-adolescent, adolescent and adult sexual development, it is of invaluable aid in helping to resolve sexual problems of married and unmarried persons. The

¹A series of affidavits presented by the petitioner in support of a motion to dismiss the indictment (JA 13-146) were stricken from the motion by the trial court (JA 151). It is apparent, however, from a reading of the overwhelming majority of the statements contained therein from different physicians, psychiatrists, psychologists and ministers, that the Handbook was considered an important contribution to the understanding of human behavior; that the work was informative and instructive in an area of knowledge vital to individual happiness; that it was helpful in dispelling ignorance in an area of difficult sexual adjustments.

Handbook can be a source of education about sexual phenomena which can be helpful to both individuals and society.

Mrs. Serett states in the Handbook that in her adolescent years, she turned to books on sex which told her that marriage was a partnership. "I like that. That's the way it should be. Each partner should have equal rights. When I get married that's the way it would be." (P. 50). This is the philosophy by which the author has lived. If her life is not the way her detractors would have lived it, it is nevertheless a fact that the honest and sincere portrayal of that life will be of illuminating aid in helping others to solve similar problems in their own way.

3. That the Handbook does not substantially exceed the limits of candor in description of sex can hardly be disputed. In 1930, Mary Ware Dennett's pamphlet "The Sex Side of Life", a frank and informative writing on sex instruction for children, was held constitutionally protected by the courts. *United States v. Dennett*, 39 F. 2d 565 (C.A. 2 1930). Two similar candid works by Dr. Marie C. Stopes also received the protection of the law. *United States v. One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S.D. N.Y. 1931); *United States v. One Obscene Book Entitled "Contraception"*, 51 F. 2d 525 (S.D. N.Y. 1931). The works of Havelock Ellis, especially his large treatise entitled *Psychology of Sex*, published in the early 1900's, has been widely distributed. There is nothing contained in the Handbook

which is not also contained in even more candid detail in the Kinsey Report on *Sexual Behavior in the Human Female*, published in 1953, and which has received a wide general distribution. The Kinsey Report not only deals with pre-adolescent and adolescent sexual development but with problems of auto-eroticism, marital coitus, homosexual responses and with the anatomy, physiology and psychology of sexual response and orgasm. The work of the noted French writer, Simone deBeauvoir, *The Second Sex*, is a serious all-inclusive and uninhibited work on woman's place in the world. See, Chapter I, entitled "The Data of Biology"; Chapter II, "The Psychoanalytic Point of View"; Chapter XI, "Myth and Reality". Maxine Davis, a noted writer in the field, in her book entitled *The Sexual Responsibility of Woman*, discusses candidly such problems in sexual relations as the physiology of sex in woman, the art of sexual satisfaction, the technique of sexual satisfaction, the sexual nature of man and woman, and the myth of frigidity. Dr. Albert Ellis, in *The American Sexual Tragedy*, devotes chapters of his work to the male-female differences in sexual responses. Drs. Phyllis and Eberhard Kronhausen have written a book entitled *The Sexually Responsive Woman*, published in 1964. The book is a forthright discussion on the difficult problem of women's sexuality. The writing discusses in frank detail the nature of the female sex organs and a detailed revelation of interviews with four female informants, including a "more than average housewife", a "sexual sophisticate", a "married Lesbian" and a "doctor's wife". Pre-marital and extra-marital relations, auto-eroticism, the anatomy and sociology of orgasm and questions of oral sex are candidly developed in discussions with the aforesaid persons.

Neither in language nor description does the Handbook exceed what now appears frequently in marriage manuals generally distributed to the public. See, for example, Stone, *A Marriage Manual* (1952); Van de Velde, *Ideal Marriage* (1930). See also, Burton (Trans.), *Perfumed Garden*; Burton (Trans.), *Kama Sutra*. See also, Frank Harris, *My Life and Loves* (Grove Press, 1963).

The courts have also taken notice of the greater extent of tolerance or discussion of matters of sexual relations and behavior. Thus, in *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960), Chief Judge Clark, holding that the depiction of sex in *Lady Chatterley's Lover* did not exceed contemporary community standards, stated:

"In actuality his thesis here is only that pressed continuously in the modern marriage-counseling and doctors' books written with apparently quite worthy objectives and advertised steadily in our most sober journals and magazines. . . ." 276 F. 2d, at 438.

In *Haldeman v. United States*, decided January 13, 1965 by the Tenth Circuit, still unreported, there were involved eight paperback booklets or pamphlets written by Dr. D. O. Cauldwell.² The Court of Appeals, while declaring that the writings contained "revolting,

²The titles of the booklets were: "Questions and Answers Involving Sexual Ethics and Sexual Esthetics"; "Questions and Answers on Sex and the American Attitude"; "Questions and Answers on Sex Physique Disparity"; "Questions and Answers on the Sex Life and Sexual Problems of Homosexuals of Both Sexes"; "Questions and Answers About Oragenital Contacts"; "Questions and Answers about Cunnilingus"; "Questions and Answers on Undinism"; and "Revelations of a Sexologist".

nauseating, filthy and disgusting incidents", held nevertheless that the discussion contained in the booklets was no different from the discussion found in medical, scientific, educational or general informational matter.

"No one contends that the conditions and experiences referred to in the booklets do not exist or continuously confront the medical profession, law enforcement officers, and society, with perplexing problems. The record discloses without contradiction that the forms of sexual behavior described are common problems about which there is considerable literature, including discussions in many text and reference books."

The Court held that the books did not exceed contemporary community standards and were not utterly without social importance.

At the trial, Dr. Charles McCormick, testifying on behalf of petitioner herein, stated that in his opinion the predominant effect of the Handbook is not to create in the average person a morbid or shameful desire or longing with respect to sex (JA 206); that the writing was not morbid and would not tend to corrode or to turn a person against himself in the process of reading the contents (JA 210). Dr. Peter G. Bennett testified that the book would not appeal to the prurient interests of an average mature person (JA 264). Reverend Hilsheimer's testimony (JA 273, *et seq.*) was, of course, to the same effect.

In its formulation of the meaning of "prurient interest" as a shameful or morbid interest in sex, the American Law Institute in 1957 (Tent. Draft. No. 6) premised the definition as flowing from the "psychosex-

ual tension" which arises in the ordinary person in our society "caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior" (Tent. Draft No. 6, p. 10). However, the so-called social and legal prohibitions against overt sexual behavior are in the process of change. The discussion by the American Law Institute on "Sexual Offenses", in its Tentative Draft No. 5, makes this clear. The recommendations of the American Law Institute was generally against the punishment of illicit sexual relations, except when open and notorious or quasi-incestuous. Not only was there a frank and open discussion in the American Law Institute report on such matters as adultery, bigamy and polygamy, incest, rape, seduction, sodomy, and other related matters, but there was the recommendation to exclude from the criminal law "all sexual practices not involving force, adult corruption of minors or public offense" (Tent. Draft No. 5, p. 277). The Institute stated: "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." See also, Cantor, "Deviation and the Criminal Law" in 55 *The Journal of Criminal Law, Criminology and Police Science* (1964) 441.

In the light of this far more tolerant, open and advanced discussion on social and legal attitudes toward sex and sexual behavior, it is submitted that a book like the Handbook here involved does not appeal to any shameful or morbid interest in sex. The matters discussed in the Handbook are now candidly and openly discussed in all areas of society and, as heretofore been shown, the tolerance and desire for discussion by the community in the areas of sex, sexual relations and

sexual behavior are far greater than those of past decades.

4. The case below appears to have been tried and decided upon the theory that the Handbook was offensive "to the most liberal morality" (JA 366) and might in addition become available for children, to their detriment. On the latter issue, without regard to the merits of the contention, this Court, in *Butler* and *Jacobellis*, has settled the question that the standards for judging the constitutional protection of material distributed generally to the adult population cannot be measured by writings fit for use in a child's library.

On the issue of the "morality" of the Handbook, it should be initially noted that the following colloquy occurred at the trial:

"Q. Mrs. Serett, is this a work of fiction? A. No. I have lived every single minute of it." (JA 227.)³

The Handbook is an honest, truthful depiction of a person's life. It may compel the reader to realign his moral concepts, but it is not an immoral book. It may be difficult to look at the experiences as the author does, to be virtually the author, reading the book, but for these very reasons the book challenges the reader not to be judgmental, but to think. This Court has stated: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . . For speech concerning public affairs is more than self ex-

³The author was not cross-examined by the Government.

pression; it is the essence of self government." *Garrison v. Louisiana*, October Term, 1964, No. 4 (Nov. 23, 1964), 33 U.S. Law Week 4019, 4022. It is an interesting commentary that the Court of Appeals below, in comparing the Handbook with John Cleland's *Fanny Hill* (see, *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, N.E. 2d (1964)), ventured the opinion that the latter writing might be constitutionally protected because of its slight literary value and insight into the life and manners of mid-18th Century London. *Fanny Hill* is of course a male fantasy put into the mind of a woman. It is ironic that a book is suppressed when an author professes to tell the truth about her sexual life, while a writing which is an obvious fantasy is rightly granted constitutional protection as a work of some importance.

If sex and obscenity are not synonymous, it should also be recalled that obscenity and immorality are entirely distinct from each other. It is possible for persons to maintain doctrines as to marriage, the relation of the sexes, the nature and limits of the rights of property, etc., which would be regarded as highly immoral by most people and, yet, clearly there would be commission of no crime.

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is

not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

Kingsley Int'l Pic. Corp. v. Regents of N.Y.U.,
360 U.S. 684, 688.

Conclusion.

The Handbook is a work of social importance. It does not exceed the limits of customary freedom of expression nor does it appeal to a prurient interest. It is a work of candor and truth. It raises questions about the viability of sexual life that are vitally important. Suppression of such a writing would not only be contrary to law and the Constitution, but a social loss in the ever-ending struggle for men and women to understand themselves and each other.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Lillian Maxine Serett,
Amicus Curiae.

Of Counsel:

SAM ROSENWEIN.

Office-Supreme Court, U.S.
FILED

SEP 14 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER,
INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE**

IRWIN KARP
120 Broadway
New York, N. Y.

*Counsel for The Authors League of
America, Inc., as amicus curiae.*



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IN THE
Supreme Court of the United States
October Term, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

I

Petitioners are entitled to the full protection of the First Amendment to the Constitution of the United States.

The Petitioners' brief presents the arguments in support of the position that the publications in question were not obscene. We need not reiterate them, for we respect-

fully submit that regardless of the determination of the issue of obscenity, the Petitioners are entitled to the full protection of the First Amendment and, therefore, that their convictions should be reversed.

The statute under which Petitioners were convicted and sentenced (18 U.S.C. 1461) does not deal with the separate and distinct problem of preventing the dissemination of obscene materials to minors (cf. *Butler v. Michigan*, 352 U.S. 380). Nor does it prohibit the dissemination of obscene material by means which invade the privacy of individual citizens. On the contrary, the statute is being applied here to punish Petitioners for mailing "obscene" publications to adults who have chosen to order them.

We submit that to apply the sanctions of a criminal obscenity statute in this context violates the Petitioners' rights of free press, guaranteed by the First Amendment, as well as the rights of adults (who voluntarily choose to do so) to read what Petitioners have published.

An obscenity statute, by its very existence, imposes a restraint upon the publication and distribution of unobscene, as well as obscene, literary works. A publisher or a bookseller may be imprisoned if he errs in his judgment that a given book is not obscene. This threat constitutes a significant deterrent—it is a risk that many a publisher and bookseller will not assume, even though they believe a work does not violate the statute.

The risk and the deterrent effect are magnified by the difficulty of determining where the line will be drawn. In *Jacobellis v. Ohio*, 378 U.S. 184, Mr. Justice Stewart said that "under the First and Fourteenth Amendments crimi-

nal laws in this area are constitutionally limited to hard core pornography," but he went on to say:

"I shall not today attempt to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." (378 U.S. at p. 197)

If members of this Court have this difficulty, and can be divided in their opinions as to whether a particular work is obscene, and if State and Federal appellate courts experience similar difficulties (reflected not only in divided opinions but in contrary decisions on the same work), how much greater then is the uncertainty facing the publisher or bookseller who must stake his very freedom on the ultimate correctness of his judgment!

Moreover, an obscenity statute inevitably imposes a further restraint on the publication of unobscene, as well as obscene, works. A publisher or bookseller may be convinced that a book is not obscene; and his belief may ultimately be sustained by a decision of this Court or of the highest court of appeal in a State. But to vindicate that belief, he may be compelled to defend the book against prosecution, to undergo the burden and expense of trial and intermediate appeals—and sometimes of trials and appeals in several jurisdictions. The costs of defending one's right of freedom of press are heavy; many publishers and booksellers cannot afford to undertake them and, rather than run the risk of incurring them, will choose not to publish or sell unobscene works that may be attacked under

obscenity statutes.* (Cf. *Freedman v. Maryland*, 380 U.S. 51, 59.) The possibility that such a burden would have to be shouldered thus constitutes—*per se*—a formidable deterrent to the publication of unobscene works. (Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 303.)

In *Roth v. United States*, 354 U.S. 476, 488, the Court emphasized that “the fundamental freedoms of speech and press” are “indispensable” to our free society, and that the “door barring Federal and State intrusion . . . must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.” We respectfully submit that an obscenity statute, by its very existence and the threat of its invocation (albeit unsuccessfully) significantly restrains the full exercise of the rights of freedom of press and speech. Obviously this deterrent effect can only be completely avoided if the First Amendment prevented such a statute from being invoked under any circumstances. [Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 295 (concurring opinion); *Smith v. California*, 361 U.S. 147, 155 (concurring opinion); *Roth v. United States*, 354 U.S. 476, 508 (dissenting opinion).]

* On March 5, 1962, Publishers' Weekly reported that the Superior Court of Cook County, Illinois, had cleared Henry Miller's "Tropic of Cancer" against charges of obscenity. Publishers' Weekly commented: "Fighting brushfire censorship is a difficult, expensive job; 'Tropic' to date has been involved in some 60 court actions and innumerable extra-legal censorship campaigns. For those on the firing line—the publisher, and the booksellers and librarians involved—the situation still is far from clear. It is a situation in which all publishers who might ever think of publishing a 'difficult' book like 'Tropic,' have a stake."

Two years after this comment, this Court held that "Tropic of Cancer" was not obscene (*Grove Press, Inc. v. Gerstein*, 378 U.S. 577).

It may be necessary to open the door "the slightest crack" in order to prevent the dissemination of obscene materials to minors. It may be necessary to open the door "the slightest crack" to prohibit the dissemination of obscene materials by means which invade the privacy of individual citizens—e.g., to prohibit the display in public places of posters or magazine covers containing obscene matter, or other dissemination of obscene works by methods which force them upon individuals with no opportunity to accept or reject them of their own volition.

However, we submit that no public interest, superior to the preservation of the rights of free speech and free press, is served by permitting such a statute to be invoked where a book or other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the right of privacy of individual citizens. In these circumstances, the fundamental rights of free press and free speech are unnecessarily and unconstitutionally abridged by the application of obscenity statutes which interfere with the process of communication between author (and publisher) and adults who voluntarily choose to read what they have written (and published). The process is essentially a private matter. The contents of a book—obscene or unobscene—only become known to those who choose to read it, or to continue reading it when they come upon objectionable portions. That choice is not legitimately the concern of other citizens, who are not compelled to read the objectionable work, nor should it be the concern of the State.

Where a publisher distributes a book or magazine to adults who are free to decide whether they will accept it or

reject it, read it or not read it, then, we submit neither the Federal nor the State governments should interfere with the right of the author to write, the publisher to publish, or the reader to read. In these circumstances, the absolute guaranty of the First Amendment can and should be retained. Not only are the rights of freedom of speech and press thus surely preserved, but each citizen is then free to make his own choice of reading material—which in a mature and free society is where the choice should rest.*

In *Public Utilities Commission v. Pollak*, 343 U.S. 451, Mr. Justice Douglas (dissenting) said, at page 469:

"The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice."

Here there is no evidence that Petitioners forced their publications on defenseless readers. Advertisements which were admittedly not obscene were mailed to prospective customers, but the publications themselves were only mailed to those who ordered them.

* "For indecency and vulgarity the fundamental remedy is the culture of audiences and readers, and the protests of critics. Jeremy Collier cured the profaneness and immorality of Restoration drama without any official authority. But the censorship, established not to clean up the stage, but to muzzle Henry Fielding, one of the greatest of British authors, made the theatre the most stagnant cultural institution in the country." (G. B. Shaw, *"Everybody's Political What's What?"*, pp. 198, 199).

II

A criminal obscenity statute applies an unnecessarily broad restraint on freedom of press.

In *Shelton v. Tucker*, 364 U.S. 479, Mr. Justice Stewart said:

“In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means of achieving the same purpose.” (at p. 488)

In *Marcus v. Search Warrant*, 367 U.S. 717, 731, the Court reiterated this point, stating:

“... [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.”

We respectfully submit that in view of the repressive effects of a criminal obscenity statute on the publication of unobscene works, it constitutes so drastic a means—when applied *ab initio*—of preventing dissemination of obscene works, as to be in violation of the First Amendment. It confronts publishers and booksellers with what may be a choice between rejecting a book or—jail. The risk is so substantial that in the case of many unobscene works the choice will be in favor of rejecting the work or refusing to sell it. We submit that so drastic and broad a means of dealing, at

the outset, with the problem of obscene works infringes the First Amendment, when a less restrictive method is available.

In *Freedman v. Maryland*, 380 U.S. 51, the court said:

“In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing.” (at p. 60)

We respectfully submit that neither publisher nor book-seller should be subjected to any criminal sanctions unless they continue to disseminate any work which has been adjudged obscene in a non-penal, adversary procedure such as that provided by the New York Injunction Section. (New York Code of Criminal Procedure, Sec. 22-a).

III

Petitioners were entitled to have the publications judged on the basis of their contents.

Petitioners were entitled to have each publication judged solely on the basis of its contents under the standards laid down by this Court. However, it would appear from the opinion of the Court of Appeals that other factors were considered and may have had some part in the judgment of the works involved. We submit that such other factors should not have been considered. The fact that the Peti-

tioners were motivated by a desire to collect profits from their publications does not make the publications any more or less obscene (338 F. 2d 12, 15). Moreover, the presence of a profit motive should not diminish the Petitioners' protection under the First Amendment—both the profession of writing and the business of publishing depend for their very existence on profits. (Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266).

Nor were Petitioners' publications made any more or less obscene by the Petitioners' predilection for selecting unusual mailing addresses or by the standards which they used in choosing an editor (338 F. 2d at p. 13).

Consideration of these extraneous circumstances obviously increased the distaste with which the Court of Appeals viewed the Petitioners and their activities and may to some extent have influenced its judgment on the sole question—whether the publications on trial were obscene under the standards laid down by this Court.

IV

The "social importance" of petitioners' publications was not judged by the proper standards.

In *Jacobellis v. Ohio*, 378 U.S. 184, Mr. Justice Brennan said, "... a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at p. 191). It would appear that the Petitioners' publications were judged by a much more restrictive standard than this. The Court of Appeals apparently felt that only "authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of the work" are in the category of

works that have sufficient redeeming social importance in a case where obscenity is charged (338 F. 2d at p. 15). We respectfully submit that this test is contrary to the standards laid down by the Court in *Roth v. United States* and *Jacobellis v. Ohio*.

CONCLUSION

It is respectfully submitted that petitioners' convictions should be reversed.

Respectfully submitted,

IRWIN KARP

120 Broadway

New York, N. Y.

Counsel for The Authors

League of America, Inc.,

as amicus curiae.

Certificate of Counsel

I hereby certify that I am counsel for the amicus curiae The Authors League of America, Inc. and that the foregoing brief in support of the appeal is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

IRWIN KARP

120 Broadway

New York, N. Y.

*Counsel for The Authors
League of America, Inc.,
as amicus curiae.*

Letters of Consent

(Letterhead of)

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

September 9, 1965

Irwin Karp, Esq.
Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, N. Y.

Re: Ginzburg, et al. v. United States
(No. 42)

Dear Mr. Karp:

I am pleased to consent to your filing of a brief *amicus curiae* in the above-captioned case on behalf of the Authors' League of America, Inc. This is with the understanding that your brief will be filed contemporaneously with the petitioners'.

Sincerely,

/s/ THURGOOD MARSHALL
Thurgood Marshall
Solicitor General

Letters of Consent

(Letterhead of)

DICKSTEIN & SHAPIRO

September 7, 1965

Irwin Karp, Esq.
120 Broadway
New York, New York

Re: *Ginzburg, et al. v. United States*
No. 42, Oct. Term 1965

Dear Mr. Karp.

On behalf of petitioners in the above cause, I hereby consent to the filing of an amicus brief by the Authors League of America, Inc.

Very truly yours,

/s/ SIDNEY DICKSTEIN
Sidney Dickstein
Attorney for Petitioners

SD/deb

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (R. 385) is reported at 338 F. 2d 12 (3 Cir. 1964). The opinion of the district court denying petitioners' motion in arrest of judgment or for new trial (R. 354) is reported at 224 F. Supp. 129 (E.D. Pa. 1963).

JURISDICTION

The judgments of the court below were entered on November 6, 1964 (R. 394-397). A timely petition for writ of certiorari was filed on January 4, 1965, and was granted on April 5, 1965 (R. 400). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Does the federal obscenity statute, 18 U.S.C. § 1461, make criminal the mailing of material other than that which is utterly without redeeming social importance, patently offensive and makes its predominant appeal to prurient interest?
- (b) Does material other than "hard-core pornography" come within the proscriptions of 18 U.S.C. § 1461?
- (c) If so, does the federal obscenity statute violate the First Amendment's guarantees of freedom of speech and press?
- (d) Is the federal obscenity statute unconstitutionally vague and uncertain?
2. (a) Does a work have the requisite prurient interest appeal merely because it is erotically stimulating?
- (b) When no portion of a work is erotically stimulating to the average person, can it be deemed to have the requisite prurient interest appeal?
3. Are each of the works in question "obscene" within the meaning of 18 U.S.C. § 1461?

4. In determining whether material is obscene, may the the trial court receive and consider testimony of the effect of such material on adolescents?
5. Petitioners all stipulated to knowing the content of the material each was charged with mailing. Notwithstanding such stipulation, the Government was permitted to introduce evidence of one petitioner's alleged intent to appeal to prurient interest for a profit. The trial court then erroneously attributed this evidence to all petitioners and, relying upon it, convicted all petitioners. May the appellate court affirm the convictions on the theory that, since petitioners had stipulated to scienter, they had not been prejudiced by the erroneous transfer of evidence of a special intent to appeal to prurient interest for a profit?
6. (a) When special findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure are requested, may the trial court pronounce a general finding of "guilty on all counts", direct the prosecutor to prepare and submit special findings of fact, receive the prosecutor's proposed findings of fact *ex parte*, and enter findings fifty-four days after the initial determination of guilt?
- (b) Where, in making findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure, the trial court has failed to find essential elements of the crime, may the court of appeals supply the missing findings by inferring their existence from other findings and from the trial court's opinion?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The constitutional provisions involved are the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statute involved is 18 U.S.C. § 1461. The rule involved is Rule 23(c) of the Federal Rules of Criminal Procedure. Pertinent portions of the constitutional provisions, statute, and rule are set forth in an appendix hereto.

STATEMENT OF THE CASE

INTRODUCTION

This case involves review of the judgments of the court below affirming petitioners' convictions for mailing obscene material in violation of 18 U.S.C. § 1461. Petitioner Ginzburg was sentenced to five years in prison and fined \$28,000.¹ The corporate petitioners were fined a total of \$14,000, \$500 on each count of the indictment (R. 337-379). The proceedings in the courts below were as follows.

Indictment and Motion To Dismiss

On March 15, 1963, the Grand Jury returned a twenty-eight count indictment charging petitioners with mailing obscene publications and advertisements for those publications in violation of 18 U.S.C. § 1461 (R. 6-13). Ten counts against petitioners Ginzburg and Eros Magazine, Inc. were for mailing and advertis-

¹ Ginzburg was sentenced to three years imprisonment for mailing "The Housewife's Handbook on Selective Promiscuity," (Counts 11 to 16) (R. 376), and two years for mailing *Eros*, Vol. 1, No. 4 (Counts 17 to 22) (R. 376-377), the sentences to run consecutively for a total of five years imprisonment (R. 377). He was fined \$1,000 on each of the mailing and advertising counts (R. 377).

ing *Eros*, Vol. 1, No. 4 (R. 8-9, 10-11); nine counts against petitioners Ginzburg and Documentary Books, Inc. were for mailing and advertising "The Housewife's Handbook on Selective Promiscuity" (R. 6, 9-10); and nine counts against petitioners Ginzburg and Liaison News Letter, Inc. pertained to the mailing and advertising of *Liaison*, Vol. 1, No. 1 (R. 7, 11-13).

Petitioners moved to dismiss the indictment on the grounds that (1) the alleged non-mailable materials were not "obscene" within the meaning of 18 U.S.C. § 1461 and (2) that "all of [the] material [was] protected literary expression under the First Amendment to the Constitution" (R. 13-14). The second ground, insofar as it related to "The Housewife's Handbook," was supported by Ginzburg's affidavit (R. 14-16) to which were appended book reviews (R. 16-19) and sixty-nine letters of commentary from prominent psychiatrists, scientists, physicians, authors and librarians offered to support the Handbook's redeeming social importance (R. 19-147). The Government moved to strike the Ginzburg affidavit and the exhibits annexed thereto (R. 147-148) and the motion was granted immediately following argument (R. 151). The district judge, Body, J., then read "sections" of the Handbook and parts of the other material (See R. 300, 358), concluded that they were "prima facie" obscene, and denied the motion to dismiss the indictment (R. 151). His failure to read the works in their entirety before he denied the motion to dismiss did not become known until trial (R. 300).

Stipulation and Waiver

Before trial the parties stipulated (1) that petitioners mailed the challenged publications knowing

the content thereof, (2) that the advertising materials referred to in the indictment were "not in and of [themselves] alleged to be obscene [but] advertised where and how allegedly non-mailable material could be obtained," and (3) that the indictment charges that each of the alleged non-mailable items "is obscene when considered as a whole" (R. 148-150).

Petitioners waived a jury (R. 2) and the trial commenced before the district judge on June 10, 1963.

The Trial

1. The Government's Case

The Government called as its first witness the Postmaster of Blue Ball, Pennsylvania, who testified, over objection (R. 154-155), that on October 18, 1962, Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote a letter stating that "[a]fter a great deal of deliberation, we have decided that it might be advantageous for our direct mailing to bear the postmark of your city" (Ex. G1; R. 152-155). The Government stated that its purpose in offering this testimony was: "[T]his clearly goes to intent, as to what the purpose of publishing these magazines was" (R. 155). The Postmaster of Intercourse, Pennsylvania, then testified, over objection (R. 157), that in September, 1962, she received a similar letter from Frank Brady on behalf of Eros Magazine, Inc. (Ex. G2; R. 157-158).

The Postmaster of Middlesex, New Jersey, testified that petitioner Eros Magazine, Inc. was issued a permit to mail from Middlesex without affixed postage on August 14, 1962, and made substantial bulk mailings on October 7, 1962, and thereafter (R. 160-161); that petitioner Documentary Books, Inc. was issued a permit and mailed 5,543 copies of "The Housewife's

Handbook on Selective Promiscuity" through his post office (R. 161-162); and that petitioner Liaison News Letter, Inc. made first class mailings through his post office (R. 162). On cross-examination, the witness testified that all of these mailings were handled by the General Mailing Corporation of Middlesex, a mail order house so large that it had a post office substation on its own premises (R. 162-164).

The Government then introduced in evidence the advertisements mentioned in the indictment (Exs. G4-G13; R. 171).

The Government next called John Darr who testified that in the fall of 1962 he applied for a position as a writer with Liaison News Letter, Inc. (R. 173); that he had been interviewed by a Mr. Boroson and then by petitioner Ginzburg (R. 173-174); that he had submitted samples of his prior work and a sample piece for Liaison which he had entitled "How to Run a Successful Orgy" (R. 174-175); and that he was hired to write Liaison, but his employment was terminated following publication of the second issue. (R. 179-183).

The Government introduced in evidence the three allegedly obscene works² (Ex. G16-18; R. 178, 184-185) and rested (R. 185). Petitioners made a motion for acquittal which was denied (R. 185-186).

² Neither the Government's nor defendants' exhibits have been reproduced in the Transcript. Ten copies of the material comprising the subject matter of the indictment (Exs. G16-18) and the originals of material offered by defendant for comparative and demonstrative purposes (Exs. D1-D43) have been lodged with the Clerk.

2. Petitioners' Case

Petitioners' first witness was Dr. Charles G. McCormick, a clinical psychologist certified by the States of New York and California, a member of the Editorial Board of the International Journal of Group Psychotherapy, a Fellow of the American Group Psychotherapy Association, a holder of a doctoral degree from Columbia University and for sixteen years a member of the teaching staff of the New York School of Social Work, a Columbia affiliate (R. 186-188).

Dr. McCormick described the effect of pornographic material. (R. 188-196). He explained that pornography produces "both the sense of pleasure and the sense of guilt or shame" in the reader and referred to the elements that go into the creation of this dual effect, *i.e.*, the material must defile or defame sex and sexual expression (R. 188); it must distort both physical and psychological reality (R. 188); and it must be detached from reality to permit maximum indulgence in irresponsible erotic fantasies (R. 192-193). The witness testified that pornographic material is sexually stimulating to most people and that the absence of erotic response to such material would be symptomatic of physical or psychological illness (R. 193). Dr. McCormick described the difference between the average healthy male's response to pornography and his response to an attractive nude woman, testifying that in the latter case a mentally healthy male would be erotically stimulated without accompanying feelings of shame or guilt (R. 193-196).

Dr. McCormick then identified certain books and pamphlets as pornography, and they were introduced in evidence (Exs. D1-D8; R. 196-199, 201). He testified that the average person would be both revolted

and sexually stimulated by reading this material (R. 202). Contrasting the material with "Lady Chatterley's Lover" he said that while both are sexually stimulating, the impact on the mind of the ordinary individual would be radically different. "'Lady Chatterley's Lover' will not be destroying, tearing, as this material will" (R. 203-204). The distinction, he pointed out, was that pornography, such as "The Autobiography of a Flea", offered as a classic example of "hard-core" material, (Ex. D7; R. 198, 201), engrossed the average reader in a sense of being both soiled and pleased (R. 205-206).

Dr. McCormick next discussed Eros, Liaison, and the Handbook. He testified that there were some passages in Eros that were erotically stimulating (R. 212-214), but even considering those passages separately, they would have "no deteriorating effect on the individual * * *. It is erotically stimulating, but it is not pathological. In other words, there is not a sickness that is being insinuated into the reader" (R. 214). He stated that the dominant effect of Eros would *not* be to create in the average person an itching, morbid or shameful desire with respect to sex (R. 211-212).

The witness testified that the predominant effect of Liaison was *not* to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (R. 215). In fact, he said, there was nothing in Liaison which could sexually stimulate a normal person at all, and added that only extremely ill persons, termed "paraphiliacs", could be sexually aroused by Liaison's contents (R. 215).

Dr. McCormick testified that the Handbook "would be quite useful as an educational instrument" since it

"gives in real life terms * * * a realistic portrayal of the evolution of sexual awareness and sexual expression * * * [of] an ordinary, everyday person * * * who had to grope her way through just like everybody else has to grope his way through toward some kind of a sexual adjustment and in that sense it is a valuable instrument for a person who is looking for * * * sexual education" (R. 216). In response to the question whether the predominant effect of the Handbook was to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (R. 209), Dr. McCormick testified: "No, it is not. That is the distinction between pornographic and erotic material. The distinction * * * is that the pornographic material is morbid, does tend to corrode and to turn the person against himself in the process of reading or seeing. In the case of 'The Handbook', this effect will not take place for the ordinary person reading it" (R. 210). The Government did not cross-examine Dr. McCormick (R. 222).

Petitioners' next witness was Professor Horst Janson, Chairman of the Fine Arts Department of New York University, a recipient of two Guggenheim Fellowships, author of many articles and books on the history of art, and Editor-in-Chief of "The Art Bulletin," official journal of the College Arts Association of America (R. 218-219). Professor Janson was unreserved in his praise of the "artistic merits of Eros as a whole" (R. 222). He said that "in terms of the material contained therein, in terms of the graphic layout, and the taste displayed in the presentation of this material, [Eros] is certainly the equal of any magazine being published today" (R. 222). He singled out for special praise and comment the series of photographs

entitled "Black and White in Color" (R. 221). Professor Janson was not cross-examined (R. 222).

Lillian Maxine Serett then took the witness stand (R. 223). She identified herself as the author of the Handbook under the pseudonym Rey Anthony and testified that it was a completely factual autobiography (R. 223, 227). She said that she had written the book because she believed "that a woman's role in sex is widely misunderstood. I hoped that my book written in a language that a lay person can understand could communicate several facts and these would be primarily for women, and one of them would be that the sexual activities and attitudes that the women have are not unusual or unique. They are not different, and another was that various forms of sexual expression are normal and healthy things to do, and also that women do have sexual rights" (R. 226).

She also testified that her own publishing house, Seymour Press, had been advertising and sending the Handbook through the mails since October, 1960, several years prior to the publication and mailing of the Documentary Books edition, and was still continuing to mail it (R. 223-225). She testified further that the Handbook had been and was being ordered, reordered and used by doctors, ministers and at least one medical school, the University of Oregon (R. 225-226). Mrs. Serett was not cross-examined.

Petitioners then called Dwight Macdonald, a distinguished critic and one of the nation's leading commentators on American mass culture (R. 227). Mr. Macdonald is a member of the staff of "The New Yorker", film critic of "Esquire" and the author of many books and articles of literary criticism (R. 228-230). He

testified that in the course of his professional activities he reads about 200 books a year (R. 230).

Mr. Macdonald traced the recent history of the public arts from the novel "Forever Amber" to the novels "Fanny Hill" and "Naked Lunch" (R. 230-231); from the motion picture "The Outlaw" to the motion pictures "Cape Fear" and "Irma La Douce" (R. 234-235); from the Petty and Varga girls of Esquire to the "girlie" magazines of today (R. 233). He testified at length regarding this country's contemporary limits of candor regarding descriptions of sex and nudity (R. 230-235). According to Mr. Macdonald, Eros was considerably within the limits of sexual discussion found in other works freely available in the United States; and neither Liaison nor the Handbook went beyond these limits (R. 235-238). Mr. Macdonald added that the Handbook was less explicit in its descriptions of sexual episodes than "Lady Chatterley's Lover" (R. 236) which was freely sold throughout the United States (R. 232).

Commenting on the literary qualities of Eros, Mr. Macdonald testified that a number of articles in Eros were of considerable literary merit (R. 238-240). The Government did not cross-examine Mr. Macdonald (R. 241).

Mr. Arthur J. Galligan then testified concerning magazines, paperback books, and other literary materials that were freely and openly displayed for sale on major newsstands and bookstores in New York and Philadelphia. Materials purchased at various locations in these cities were introduced into evidence as Exs. D10-D43 (R. 256). There was no cross-examination (R. 256).

Petitioners' next witness was Dr. Peter G. Bennett, a practicing psychiatrist in Philadelphia and a teacher

of psychiatry at the University of Pennsylvania Medical School (R. 256-257). Dr. Bennett delivered a dissertation on the effect of pornography (R. 259-263), stating that it "is not simply an intense stimulation of erotic feelings. It includes this, of course, but erotic stimulation of itself is definitely not harmful or disturbing to the ordinary mature adult, whereas pornography has, always, in addition, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (R. 259-260). Then followed a detailed analysis of the emotional and environmental factors which play a role in the development of sexual attitudes, and Dr. Bennett's exposition of the psychological mechanism by which pornography achieves its effect (R. 260-263).

Dr. Bennett testified that, in his opinion, the Handbook would not create in the average person the effects he attributed to pornography (R. 264). He stated that while the average person who read Eros might find some "occasional sexual stimulation" (R. 265), the predominant effect of Eros was *not* to create any morbid feelings of shame and guilt (R. 259-260, 264-265), and there was nothing in Liaison which could in any way sexually stimulate the average person (R. 265-266).

The Government cross-examined Dr. Bennett on the meaning he had given the term "hard-core pornography" in a prior writing (R. 266-270), after which the trial court proceeded to conduct its own examination of the witness (R. 270). The trial judge instructed Dr. Bennett to turn to page 207 of the Handbook, inquired whether the author there described an act legally classifiable as sodomy, and asked whether the average person would have a shameful reaction upon

the reading of that page (R. 270-271). Dr. Bennett replied that that would not "cause a shameful reaction in the average reader" (R. 271). The trial court next inquired whether a reading of the book by a boy or girl near 21 years of age "would suggest to them a way of having sexual intercourse in order to have greater sexual satisfaction" and Dr. Bennett answered, "Yes" (R. 271). The court then asked whether fourteen-year-olds reading the book might not be induced to try sodomy as a source of greater sexual satisfaction and Dr. Bennett said, "No, I don't believe they would at that age" (R. 272).

The trial court next asked Dr. Bennett to read page 202 of the Handbook and verify whether that page "suggests a moral code that it is all right to have sexual relations with one not your spouse" (R. 272). Dr. Bennett confirmed that that seemed to be the author's opinion (R. 272-273). Finally, the trial judge asked whether any of his questions had changed Dr. Bennett's opinion concerning the non-obscenity of the Handbook (R. 273) and Dr. Bennett replied that they had not (R. 273).

Defendants next called Reverend George von Hilsheimer, III, a Baptist Minister (R. 273). Reverend von Hilsheimer studied theology and psychology at Washington University in St. Louis, the University of Miami, and the University of Chicago (R. 274-275). His training in psychology includes extensive clinical activities at the Child Guidance Center in Lincoln Park, Missouri, and at New York City's Association for Counseling and Therapy (R. 274). Reverend von Hilsheimer has lectured extensively in universities and theological schools on such subjects as comparative religion, contemporary morals, education, and therapy

(R. 275). He is resident minister and group counselor for the Greater New York Humanist Council and Executive Director of the Fund for Migrant Children (R. 275-277). He was a ministerial counselor to the President's Study Group on National Voluntary Services and a board member of Mobilization for Youth, the first project established by the President's Committee (R. 276). His professional activities involved substantial contacts with the underprivileged in both urban and rural areas (R. 276, 277).

Reverend von Hilsheimer testified that he had first seen the Housewife's Handbook in 1960 when he was given "a copy as a useful tool in therapy" by a colleague at the Association of Counseling in Therapy (R. 289). Since then, he said, he had used the book in pastoral counseling and psychological counseling (R. 289). He testified that the book was particularly valuable in cases of married women who were invested with a sense of shame and guilt about their sexual imageries, values and experiences in that it tends to relieve this sense of shame by giving "the women to whom [he] gives the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual" (R. 290). He pointed out that the usual marriage manuals are not as helpful as the Handbook because they emphasize the physiognomy of sex and use language "utterly foreign to the majority of people [he works] with" (R. 292). He described the Handbook's special value to both pastoral counselors and psychologists when he testified:

"Now, it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which

they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'You are not alone. This is the experience of many, many people', and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. There is no sense of shame involved in it. There is no sense of prurience involved in it. There is no sense of wallowing in sexuality simply for its own sake but it is a simple, straightforward recount of a fairly unhappy history of a fairly typical woman, and I can say based on my clinical experience and the experience of my colleagues and the literature that this book is not drawn far from the average middle American experience whether involved with one or several partners" (R. 291-292).

On cross-examination the Government asked the witness whether people are assisted by presenting them with "a mass of extramarital engagements" (R. 294) and he answered that he does "not use [the Handbook] as a blueprint for what [people are] supposed to do" but for other purposes (R. 294). He added: "If anything, it teaches that [extramarital] sexuality is not likely to be very enjoyable" (R. 295).

The trial judge then examined the witness (R. 296). First, he inquired whether the witness would have the Handbook "in the library of [his] home if [he had] a fourteen or fifteen, or sixteen-year-old son or daughter" (R. 296). Reverend von Hilsheimer replied that he had it in his home and that it was read by teenage children in his parish who could freely discuss it and what it represents with him in his role as pastoral

counselor. The witness went on to say that the children in his parish (underprivileged members of a racial minority) have "freely available to them hardcore pornography, shamefully discussing lewd, prurient kinds of garbage * * * and their whole understanding of sex is one of exploitation of the girl on the one hand—and the girl has practically no knowledge of what is going on" (R. 296). He described the woeful ignorance of certain underprivileged members of society "who simply do not know the source of pregnancy and their only sexual information is entirely pornographic" (R. 297).

The judge said: "I ask you again, do you give your stamp of approval on the methods of sexual relationships set forth in this book * * *?" (R. 310-311). Stating he was limiting his comments to married couples, the witness answered: "So long as the integrity of one another is respected and so long as it is a natural and easy development of a loving couple, then I don't recall anything in the book which I regard or which is generally regarded as perverse" (R. 311).

Following a brief additional cross-examination by the Government (R. 312-316), Reverend von Hilsheimer was excused and the defense rested (R. 316).

3. The Government's Rebuttal

The Government called three witnesses, stipulating that the testimony of these witnesses should be considered only for rebuttal purposes and not as affirmative evidence on the issue of obscenity (R. 334-335).

The first rebuttal witness was Dr. Nicholas G. Friginito, chief psychiatrist of the County Court of Philadelphia, consultant in neurology to the Veteran's Ad-

ministration Hospital, and associate professor of neurology at Hahnemann Medical College (R. 316-317).

Dr. Frignito testified that, in his opinion, the Handbook had no medical value and was "obscene" (R. 318-319). He stated that he thought the book a "menace" and that it "can lead to a lot of chaotic situations, because my interpretation of the book, it fosters promiscuity. It fosters sexual perversity" (R. 320). Over defense counsel's continuing objection (R. 321, 322, 323), Dr. Frignito was permitted to testify as to the effect of the book upon adolescents, stating that "it certainly is a very dangerous thing" and that "this type of book" encourages delinquency in adolescents because "it would lead to self-abuse, masturbation, and that * * * would lead to other types of sexual activity" (R. 320-324).

On cross-examination, Dr. Frignito admitted he had never heard of Dr. Van de Velde and was unacquainted with that author's classic works on marriage and sex (R. 327).³ He further stated he had not read "Love Without Fear" by Dr. Eustace Chesser (R. 327). After being apprised of Dr. Chesser's views on the "genital kiss," Dr. Frignito testified that such activity between married people was not perverted and that that was the opinion of most psychologists and marriage counselors (R. 328). But when confronted with his directly contradictory testimony in another case (R. 328-329),⁴ he testified that such a practice "is a perversion, no matter who practices it * * *." (R. 329).

³ Dr. Theodore H. Van de Velde was the author of *Ideal Marriage, Its Physiology and Technique* (1930); *Sexual Tensions in Marriage* (1931) and more than eighty other principal works.

⁴ *Commonwealth v. Robin*, Court of Common Pleas No. 2, Philadelphia, Pa., Sept. T. 1961, No. 3177, Jan. 22, 1962.

Dr. Frignito was next asked whether he regarded the physical touching of the private parts "in love-play between a married couple as indecent" and he replied that he did not (R. 329). Confronted again with his contradictory testimony in the other case (R. 330), he recalled that he previously testified that such activity constituted a perversion (R. 330). Dr. Frignito contradicted his prior testimony in the other case three more times (R. 331-332) and concluded his testimony by stating that, despite this Court's holding to the contrary (R. 333), the nudist publication "Sunshine and Health" was obscene "because they portray the completely nude body, men and women" (R. 333).

The next rebuttal witness was Dr. Ann Hankins Ford, chief of psychiatry at the Woman's Hospital and head of the Ann H. Ford Clinic. Dr. Ford, a graduate of the University of Pennsylvania School of Medicine, is a diplomate of the American Board of Neurology and Psychiatry, and has taught at the University of Pennsylvania and the Woman's Medical College. At the time of her testimony she was engaged in private practice (R. 335-336).

Dr. Ford testified that, in her opinion, the Handbook had no medical value in the field of psychiatry or psychology (R. 337) and that it would be disturbing, rather than helpful, in the treatment and counseling of her patients (R. 338). On cross-examination, Dr. Ford acknowledged that her patients were "people who were disturbed in one way or another" (R. 339).

The third and last rebuttal witness was Reverend Adolph E. Kannwischer, a Baptist minister, the holder of the degrees of Master of Sacred Theology from Union Theological Seminary and Doctor of Philosophy

from New York University, and formerly a professor of psychology and director of guidance at Eastern Baptist College and a federal prison chaplain (R. 342). Reverend Kannwischer testified that he had taken several courses in social psychology in the New York Psychiatric Institute and was a member of the Academy of Religion and Mental Health (R. 343). He testified that he would not use the Handbook in pastoral counseling because he would regard it as "detrimental to a person who already is having problems" (R. 344). This concluded the Government's rebuttal testimony.

On summation, the Government conceded that Eros was not "hard-core pornography" but declined to make that concession as to the other material (R. 349). Petitioners motion for a judgment of acquittal was denied (R. 344, 345, 348).

4. The Request for Findings and the General Verdict

After denial of the motion for judgment of acquittal, petitioners' counsel "request[ed] in accordance with Rule 23(c) of the Federal Rules of Criminal Procedure that in the event of a finding of conviction the court make findings of fact especially with regard to each essential element of the crime" (R. 348).

The court announced that its "ruling will be reserved" (R. 348). Thereupon, the Government advised the court that it "has no objections to specific findings of fact as requested by the defendants," but the court replied "[w]e will have to decide that at the end of the argument—because we have this problem of the next case. And I do not believe that we will be able to do it, but I have to determine that later on." (R. 348-349)

The next morning the court announced: "I find the defendants guilty on all counts" (R. 349), and added: "There was a request by counsel for the defendants in regard to special findings of fact, and I will find the facts especially as requested by defendants' counsel. At the earliest possible time they will be found. Meanwhile, I would like to request the government through Mr. Creamer to submit to me proposed findings." (R. 349)

5. Proceedings After the General Verdict

On June 27, 1963, petitioners filed a timely motion in arrest of judgment or, in the alternative, for a new trial, urging, *inter alia*, that the trial court had found defendants guilty without making findings of fact as required by Rule 23(c) of the Federal Rules of Criminal Procedure (R. 350). Prior to answering petitioners' motion, the Government furnished the trial judge with findings of fact which were neither served upon defense counsel nor filed in the docket. On August 6, 1963, fifty-four days after petitioners had been found guilty on all counts, the trial court filed Special Findings of Fact (R. 351-353). The Government then answered petitioners' pending motion in arrest of judgment or for a new trial, and approximately three months later, the trial court filed an opinion denying the motion (R. 354-368).

Explaining why he had asked Government counsel to prepare proposed findings of fact to support the general finding of guilty made the morning after trial concluded, the trial judge said that this was a case requiring "careful consideration," "detailed legal research" and "assistance of counsel" (R. 360), adding: "Defendants were not precluded from submitting find-

ings [in support of their guilt] but apparently chose not to do so" (R. 360).

On December 19, 1963, the trial judge sentenced petitioner Ginzburg to five years imprisonment and a fine of \$28,000, and fined the corporate defendants \$500 on each count (R. 373-376). A notice of appeal was filed the same day (R. 380).

6. The Appeal

The appeal was argued on June 16, 1964, and decided on November 6, 1964 (R. 385). The court of appeals unanimously affirmed petitioners' convictions (R. 394-397). On November 17, 1964, the court of appeals stayed issuance of its mandate (R. 398), which stay remains in effect pending disposition here.

SUMMARY OF ARGUMENT

I

In *Roth v. United States*, 354 U.S. 476 (1957), this Court held that material utterly without redeeming social importance, dealing with sex in a manner predominantly appealing to prurient interest, and substantially exceeding contemporary limits of candor is proscribable obscenity, the mailing of which is made criminal by 18 U.S.C. § 1461.

Under the test promulgated by *Roth* and refined by its progeny, a work that advocates ideas, informs, or is useful to society in any other way, is not obscene. Moreover, as Mr. Justice Brennan's opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), makes clear, the social importance of a work may not be weighed against its prurient interest appeal to determine its relative social value for only works "utterly without redeeming social importance" are outside of First

Amendment protection. Were it otherwise, the standard of criminal conduct would be so vague and indefinite that the Fifth and Sixth Amendments, as well as the First, would be violated.

In *Roth*, this Court further limited coverage of the obscenity statute to material which contains sexual descriptions substantially exceeding contemporary limits of candor. This element, called "patent offensiveness", embodies concepts of due process and equal protection. Especially where freedom of speech and of the press are concerned, society cannot condemn that which it generally tolerates. *Smith v. California*, 361 U.S. 147, 171 (1959) (Harlan, J., concurring).

In establishing the prurient interest appeal test in *Roth*, this Court made clear that prurient interest and sexual stimulation were not synonymous. Pruriency exists when, viewed as a whole, the work's predominant effect is to invoke shame, guilt or morbidity, and in measuring this effect, certainly insofar as this case is concerned, it is the impact of the challenged material upon the average person that must be determined.

II

Although this Court has not yet said so, and need not say so in order to hold that the works at issue in this case are not obscene, petitioners submit that only that material known as "hard-core pornography" meets all the tests enunciated in *Roth*. This is the material which was described by the Solicitor General in his brief in the *Roth* case, examples of which he lodged with the Clerk of the Court. The coalescence of all elements of proscribable obscenity in "hard-core" material results in a product readily distinguishable from other works dealing with sex providing a comparative method of separating the suppressible

from the protected. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Aside from the objective test that such comparative differentiation affords, petitioners believe that each of the *Roth* concepts may be made the subject of objective evidence, and in the trial court petitioners offered such evidence as to each of the challenged works. However, as will be seen, the trial court disregarded both the evidence and the legal standard, relying instead upon a personal predilection as to what was obscene.

III

A. The uncontradicted testimony and a reading of *Eros* itself establish that *Eros* has considerable literary and artistic merit. Although some of its pages contain passages sexually stimulating to the average person, the experts testified that these passages would not induce shame or morbidity. Moreover, *Roth* requires that a work be judged as a whole and, as a whole, *Eros* is not even sexually stimulating. The testimony and the evidence of books and periodicals openly sold and widely circulated also demonstrate that *Eros* is well within the limits of candor that society now tolerates in its literature.

B. The Housewife's Handbook of Selective Promiscuity is a true autobiography in which the author details her sexual experience and attitudes. It provides those who are interested in such matters with useful information and valuable insight, and was purchased and used by doctors, ministers, marriage counselors and at least one medical school. The book is also one of serious social comment, the author's advocacy of changes in prevalently held sexual attitudes being expressed throughout. Petitioners also introduced expert testimony to establish that a reading of the

Handbook was useful to women whose normal sexual drives generated feelings of guilt. The Government offered testimony by other experts who thought that the Handbook was not useful for this purpose. The trial court resolved the debate by finding that the Handbook had no such utility. But this value, even if debatable, and the other unchallenged values of the book establish its redeeming social importance.

The Handbook's treatment of its subject is serious, not salacious. The testimony at trial also established that reading the Handbook would not move the average person to morbid and shameful desires with respect to sex. In addition, the expert testimony and a comparison of the Handbook with other works, including sex and marriage manuals, shows that the Handbook does not go substantially beyond contemporary limits of candor.

C. The challenged issue of *Liaison*, the biweekly newsletter, was primarily devoted to the report of an interview with a noted psychologist and marriage counselor in which he forcefully advocates complete freedom of sexual expression. The trial court's ruling that expression of this view is unprotected by the First Amendment is plainly wrong. *Kingsley International Pictures v. Regents*, 360 U.S. 684 (1959). But social value issues aside, the uncontradicted testimony was that *Liaison* did not go beyond customary limits of candor in its discussions of sex. Moreover, it was established that *Liaison* did not have prurient interest appeal since nothing in it could sexually stimulate an average person, and the experts testified, without contradiction, that only a mentally ill person would be sexually stimulated by this material.

Because none of the materials are themselves obscene the convictions on the advertising counts must likewise be reversed.

IV

Since none of the challenged publications come within any of the tests for obscenity enunciated in *Roth*, petitioners could not have violated 18 U.S.C. § 1461 by mailing them. However, even if all the publications were obscene, petitioners' convictions would nonetheless have to be reversed.

Although prurient interest appeal and patent offensiveness must conjoin for a work to be held obscene, the trial court failed to find that Eros was patently offensive or that Liaison appealed to prurient interest. These defects in convictions on the Eros and Liaison counts of the indictment may not be remedied by the trial court's subsequent opinion or on appeal. *Stone v. United States*, 164 U.S. 380, 383 (1896); *Wilson v. United States*, 250 F.2d 312 (9 Cir. 1957).

V

A. The convictions of all petitioners except Eros Magazine must be reversed because the trial judge, over petitioners' objection, permitted the Government to introduce evidence purporting to establish a specific intent to appeal to prurient interest for a profit. This evidence, if admissible at all, was admissible only against Eros Magazine Inc., but the trial court erroneously attributed it to all the defendants and used it to support their convictions. The court of appeals, applying a different theory of the offense than that upon which the Government had tried its case, held that petitioners were not prejudiced by the erroneous transfers of intent. This was error. *Bram v. United States*, 168 U.S. 532 (1897); *Cole v. Arkansas*, 333 U.S. 196 (1948).

B. The convictions on the Handbook counts must also be reversed because the trial court admitted and relied upon evidence of the Handbook's effect on adolescents. *Volanski v. United States*, 246 F.2d 842 (6 Cir. 1957).

C. Finally, the convictions of all petitioners must be reversed because the trial judge, although requested to find the facts specially pursuant to Rule 23(c), Federal Rules of Criminal Procedure, first found petitioners guilty, then asked the prosecutor to submit findings to support the guilty verdict, received the prosecutor's proposed findings *ex parte*, and adopted those findings fifty-four days after he had determined petitioners to be guilty. If this has occurred in an ordinary criminal case, it would violate every safeguard Rule 23(c) was designed to afford. But reversal is required here, *a fortiori*, for, as the trial court said, this was not an ordinary criminal case. The facts were "not clear and precise", and the "legal ramifications" required "careful consideration" and "detailed legal research".

Under these circumstances the trial court's judgment that defendants were guilty, prior to making the analysis which the requirement of special findings contemplates, was as much a prejudgment as if the court had pronounced petitioners guilty in advance of trial. Subsequent to the decision herein the court below gave comprehensive consideration to the requirements of fact findings. *Roberts v. Ross*, 344 F.2d 747 (3 Cir. 1965). No lesser standard can be tolerated in a criminal case, especially one involving "regulation of obscenity" which must "embody the most rigorous procedural safeguards". *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). When a trial judge convicts, delegates to the prosecutor the responsibility to prepare findings to support the conviction, receives these findings *ex*

parte and off the record, and purports to make findings 54 days after he has adjudged the defendants to be guilty, the judgments of conviction cannot be sustained.

ARGUMENT

I.

THE STANDARD OF OBSCENITY

A. Introduction

In *Roth v. United States*, 354 U.S. 476 (1957), this Court enunciated the determinant concepts by which that which may be suppressed was to be judicially separated from that which may not. Obscenity, said the Court, is that which is "utterly without redeeming social importance" (*Id.* at 484); "deals with sex in a manner appealing to prurient interests" (*Id.* at 487); and "goes substantially beyond customary limits of candor in description or representation of such matters" (*Id.* at 487, ftn. 20). This is one of the ever increasing number of cases coming to this Court in which federal and state judges have misunderstood and misapplied these concepts.

Triers of fact still persist in finding that a work has prurient interest appeal because they believe that the average man should not be permitted to read it.⁵

⁵ And are encouraged to do so by federal prosecutors who argue:

"[Prurient interest appeal] does not mean * * * that the actionable material must appeal to the prurient interest of the average person [but rather that] it appeals to [what] the average person considers an unwholesome preoccupation with sex." Brief for Appellee, *United States v. West Coast News Co., et al.*, Nos. 15792-15795 (6 Cir. 1965), pp. 32-33.

See also *United States v. Klaw*, 2 Cir., Docket No. 28887, Slip op. at 2761, ftn. 11 (July 15, 1965).

"Customary limits of candor" are still measured by the type of material a trial judge would have in *his* library or upon *his* coffee table. The concept "utterly without redeeming importance" is too often employed as a mere label to be attached to that which stands condemned.

Attempts to treat these concepts as objective standards and to offer evidence in traditional form on whether a particular work can by such standards be judged "obscene" are rebuffed by triers of fact whose subjective reaction to the work is too strong to permit enlightenment by objective proof.

In this case the *Roth* standard was misapplied by the prosecutor in the first instance, then by the trial court, and finally by the court of appeals. It is appropriate, therefore, to set out the standard by which petitioners believe the materials which were the subject of this prosecution must be judged under *Roth*. In doing so, we note at the outset that this case involves: (a) criminal punishment—not civil restraint, (b) federal—not state action, and (c) a statute not designed for the protection of a particular group and which makes no distinction between large mailings for a profit and the sending of a single letter by a private person.

B. Redeeming Social Importance

We begin our discussion of obscenity standards with the concept of "redeeming social importance" since, as we understand this Court's *Roth* opinion, only publications "utterly without redeeming social importance" may be constitutionally subjected to the "prurient interest" and "patent offensiveness" tests for obscenity. Petitioners emphasized "redeeming social importance" in the courts below since they believe it

was a concept upon which objective evidence could most readily be offered and understood. The trial court admitted all the evidence which established redeeming social importance but concluded that the works were nonetheless obscene. The court of appeals held the works at issue to be without redeeming social importance and sustained the convictions. We think the courts below misunderstood the meaning of the concept and erroneously disregarded all the evidence of social value, including the evidence afforded by the works themselves.

In *Roth* this Court held that "obscenity" could be excluded from the protection the First Amendment afforded to other writings because it is "utterly without redeeming social importance" (*Id.* at 484). But as Mr. Justice Brennan reiterated in *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964), material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection". See also *Kingsley International Pictures v. Regents*, 360 U.S. 684, 689 (1959).

A lower court judge⁶ recently imparted a new and helpful dimension to the term "social importance" when he instructed a jury that a work has this quality:

"If it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might otherwise have missed, or deepens his emotions, or makes life

⁶ Judge Bernard Selber in *People v. Getz*, Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, No. 207224, December 8, 1964, quoted at II Law in Transition Quarterly 109 (1965).

seem richer, more interesting, or more comprehensible, or provides insights into man's relationship to the social world in which he lives. A work may have social importance even if it appears worthless to the average person or to most persons."

We turn then to the question of how much value a work must offer not to be outside the sweeping protection of the First Amendment? The answer was given in *Roth* and repeated in *Jacobellis* when Mr. Justice Brennan said:

"[T]he constitutional status of the material [may not] be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at 191).

The highest courts of California,⁷ New York⁸ and Illinois⁹ agree.

This First Amendment principle bars suppression of any work of the slightest value, whether the suppression be accomplished by civil order or criminal sanction. But when dealing with a criminal statute, as we are here, there is an additional compelling reason why only material which is *utterly* without social importance can be proscribed. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948).

⁷ *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1963).

⁸ *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 200 N.E. 2d 760 (1964).

⁹ *People v. Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497 (1964).

Can this statute survive the challenge that its vagueness violates due process if men are "required to guess" whether a work has a *sufficient* quantity of social importance to permit mailing? Can persons of "common intelligence" be charged at their peril to apply a balancing test in order to ascertain whether mailing a book will subject them to criminal conviction? *Winters v. New York*, 333 U.S. at 515.

The question whether 18 U.S.C. § 1461 "violate[s] due process, because too vague to support conviction for crime" was posed in *Roth*, and answered:

"we hold that [this statute], applied according to the proper standard for judging obscenity [does] not * * * fail to give men in acting adequate notice of what is prohibited." (354 U.S. at 492)

But if "redeeming social importance" of challenged material is to be determined by first calculating the product of the quantity and quality of its social value elements and then weighing that product against its prurient interest appeal, it would be difficult to conceive of a more vague and indefinite standard of criminal conduct. Only if the words of *Roth* "utterly without redeeming social importance" mean what they say, can criminal obscenity statutes survive the challenge that they violate the Fifth, Sixth and Fourteenth Amendments. Thus, material found to have some social value may not be suppressed and certainly may not be the basis for criminal conviction of the utterer or disseminator. Only when a work is found to be totally devoid of value can we even begin to subject that work to the other tests which identify actionable obscenity.

The existence or nonexistence of value can in some instances be determined by the court without extrinsic evidence. For example, if it were claimed that a work was protected because it advocated repeal or amendment of laws restrictive of sexual conduct, judges are equipped by professional experience to detect the advocacy. However, when the claimed value is in areas where the triers of fact have no special competence, such as a claim of literary, artistic or scientific value, we think it appropriate and often necessary that opinions be elicited from those who are "learned in the art".

C. Patent Offensiveness

"[T]he *Roth* standard [for obscenity] requires * * * a finding that the material 'goes substantially beyond customary limits of candor in description or representation of [sexual] matters.'" *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (opinion of Brennan, J.); *Manual Enterprises v. Day*, 370 U.S. 478, 486 (1962) (opinion of Harlan, J.). This concept, referred to as "patent offensiveness," is derived from the words of the statute which "connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores." *Manual Enterprises v. Day*, 370 U.S. at 482.

The requirement that a work go "substantially beyond customary limits of candor" before it can be suppressed as obscene also embodies a constitutional requirement of due process. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith v. Cali-*

fornia, 361 U.S. 147, 171 (1959) (Harlan, J., concurring).¹⁰

In order to determine whether a particular work is "patently offensive" we must begin with ascertainment of the limits of sexual candor that society now tolerates in literature and other forms of expression. The work in question must then be examined to see if it goes *substantially* beyond those limits.¹¹

Petitioners believe, and tried their case on the assumption, that the contemporary limit of sexual candor is a question of fact on which evidence can be adduced. Experts on mass culture whose professional experience and activities provide them with information as to what books and magazines are being sold and read are in a much better position to know what society now tolerates than a judge whose personal reading habits may be quite different from those of the crowd. Examples of books and magazines openly displayed and publicly sold are also evidence of what society now tolerates, although it may be most unlikely that a jurist would be inclined to buy and read such publications. Courts can also take judicial notice of books in wide circulation. Petitioners offered evidence under each of these categories.

¹⁰ Cf. *United States v. Klaw*, 2 Cir., Docket No. 28887, Slip op. at 2769-2770 (July 15, 1965) wherein Judge Moore questions whether the defendant, convicted for mailing sado-masochistic books, "might understandably wonder as to the meaning of equal protection of law" on reading such works as "Fanny Hill", "Tropic of Cancer" and "Pleasure Was My Business" in the prison library.

¹¹ *Roth v. United States*, 354 U.S. 476, 487, fn. 20 (1957); *Grove Press v. Christenberry*, 175 F. Supp. 488, 499 (SDNY 1959), aff'd 276 F.2d 433 (2 Cir. 1960); American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962 § 251.4(1)).

D. Prurient

In *Roth*, with the "evident purpose to tighten obscenity standards",¹² this Court stated that henceforth the test would be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). No longer could the censor consider isolated excerpts of a work. No longer could the work be judged by its impact upon those members of the community thought to be most susceptible to it. These were clear negations.¹³ Not so certain was the affirmative meaning to be ascribed to the standard. But this much was clear, "prurient interest appeal" and "erotic stimulation" were not synonymous. An appeal to prurient interest required the evocation of shame, guilt and morbidity. *Id.* at 487, fn. 20; *Grove Press v. Christenberry*, 175 F. Supp. 488, 499 (SDNY 1959), aff'd 276 F. 2d 433 (2 Cir. 1960). Material evoking a healthy sexual response was not proscribed. *Roth v. United States*, 354 U.S. at

¹² *Manual Enterprises v. Day*, 370 U.S. 478, 487 (1962).

¹³ But not so clear that they were accepted by the courts below. Both courts dealt with bits and pieces of Eros (R. 364-365, 389), despite the Government's stipulation that Eros and the other works were to be considered as a whole, and the trial court determined that all of the works in question were "*prima facie*" obscene after having read only parts of them (R. 358). That court also considered "children of all ages, psychotics, feeble-minded, and other susceptible elements" (R. 368) as members of society upon whom the works' effects were to be judged, and the court of appeals apparently did the same (R. 393). In considering the materials' effect upon each member of society, rather than upon "the average man", courts "retain most of the objectionable rigor of the old Hicklin rule * * *." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 72 (1960). See also *Butler v. Michigan*, 352 U.S. 380 (1957).

487; *Flying Eagle Publications v. United States*, 273 F. 2d 799, 803 (1 Cir. 1960).

In *Roth* we were also told that prurient interest was to be determined by the materials' "impact" upon the "average person" (354 U.S. at 489, 490). Certainly this is true when material is not aimed at a special audience, and the publications at issue were neither designed for nor directed to adolescents¹⁴ nor to any other specially susceptible group.¹⁵

¹⁴ See: Richard H. Kuh, former Assistant District Attorney, New York County, *Obscenity: Prosecution Problems and Legislative Suggestions*, 10 Catholic Lawyer 285, 291-292 (1964):

"Mailmen, trudging their appointed rounds during the winter of 1961-62, may have been warmed by both the content and volume of a mailing piece they were carrying. Ralph Ginsburg [sic], formerly an editor of *Look* and *Esquire*, and author of the highly successful mail order volume *An Unhurried View of Erotica*, had sent out millions of stimulating mailing pieces, promising choice erotic items in a quarterly, *Eros*, he was about to publish. * * *

"By the time the fourth issue appeared in the winter of 1962-1963, we had formed an impression that the quarterly was becoming progressively more obscene, at least to an extent that it merited presentation to a grand jury to determine whether the jury, as the 'conscience of the community,' found that 'contemporary community standards' had been violated. * * * As best we were able, we tried to put the case to the grand jurors 'down the middle' in order to get the voice of that 'conscience' unpricked by prosecutorial thinking. After hearing witnesses and examining the magazine and its advertising, in the spring of 1963 the grand jury filed 'no bill,' declaring—in effect—that *Eros* was not repugnant to the contemporary community's highly sophisticated standards, and that any advertising of it that happened to fall into the hands of youngsters was unintentional, and inevitably incidental to the publication's massive direct mail campaign."

¹⁵ The fact that more than 5,000,000 advertising circulars were mailed for *Eros Magazine* (R. 161) would hardly be consistent with an attempt to circularize selected perverts. Cf. *Manual Enterprises v. Day*, 370 U.S. at 482; see also *United States v. Klaw*, 2 Cir., Doc. No. 28887, decided July 15, 1965.

"Pruriency"¹⁶ then is the "effect" element¹⁶ of proscribable obscenity and is determined by the materials' impact on the average person. Petitioners believe that such determination requires awareness of the state of mind of the average person concerning sexual matters and of the psychological mechanism by which obscenity induces feelings of sexual guilt, shame and morbidity. These are factual matters especially given over to the competence of trained and credentialed psychologists and psychiatrists, such as those who testified in this case. Whether a particular work has the capacity to induce morbid and unhealthy response in the average person is also a question for those who are skilled in analysis of mental stimuli and reactions. Lay speculation and suspicion "about the prurient appeal of material to some * * * person whose psyche is not known" is bound to be uninformed and may even be legally unpermissible. *United States v. Klaw*, 2 Cir., Docket No. 28887, Slip op. at 2766 (July 15, 1965).

II.

"HARD-CORE PORNOGRAPHY"—THE ONLY MATERIAL THAT MEETS THE TESTS FOR OBSCENITY

The term "hard-core pornography" identifies a specific class of material which in *Roth* the Solicitor General described as follows:

"This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguise.

"Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and

¹⁶ *Manual Enterprises v. Day*, 370 U.S. at 484.

in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple explicit words of sexual excesses of every kind, over and over again.^[17] No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books,' specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. * * * It may safely be said that most, if not all, of this type of booklet contains drawings not only of normal fornication but also of perversions of various kinds." (Brief for the United States at pp. 37-38)

In that case, examples of "hard-core" material were lodged with the Clerk of this Court by the Solicitor General. Other examples were received in evidence in this case (See Exs. D1-D8, R. 196-199, 201). Two experts, a psychiatrist and a psychologist, testified that this type of material has a special effect which distinguishes it from other works which "simply [pro-

¹⁷ The content of hard-core material of the textual variety is also described in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 63-64 (1960). Such works "are always made up of a succession of increasingly erotic scenes without distracting non-erotic passages. These erotic scenes are commonly scenes of willing, even anxious seduction, of sadistic defloration in mass orgies, of incestuous relations consummated with little or no sense of guilt, of supermissive parent figures who initiate and participate in the sexual activities of their children, of profaning the sacred, of super-sexed males and females, of Negroes and Asiatics as sex symbols, of male and particularly female homosexuality, and of flagellation, all described in taboo words." See also Kronhausen, *Pornography and the Law* 18, 178-254 (pbk. ed.) (1959).

duce] an intense stimulation of erotic feelings * * * not harmful or disturbing to the ordinary mature adult * * *". It has "in addition, a disturbing disintegrative influence even on a mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (R. 202-206, 259-260).¹⁸ Material other than "hard-core pornography" will not evoke a "prurient" response in the average healthy person.

Another distinguishing mark of "hard-core" material is that its lack of value to society is manifest. Other material dealing with sex can make serious claim to some "redeeming social importance" but it is difficult to perceive how such a claim can be made for the examples of "hard-core" material petitioners introduced as comparative evidence in this case. These examples also display a "patent offensiveness" so gross as to be "self-demonstrating".¹⁹ At this particular point in history, where society's toleration of sexual discussion in literature is almost unbounded, it would be difficult to find material that goes *substantially* beyond the limits of that toleration unless that material is "hard-core pornography".

The coalescence of these three elements (a) prurient interest appeal to the average person, (b) total lack of social value and (c) sexual descriptions going substantially beyond the customary limits of candor, results in a product which is immediately recognizable.

¹⁸ The American Law Institute premised its definition of "prurient interest" on the "psychosexual tension" which arises in the ordinary person in our society "caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior". Model Penal Code, Tentative Draft No. 6, p. 10 (1957).

¹⁹ *Manual Enterprises v. Day*, 370 U.S. at 487.

Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring). Those triers of fact who have seen examples of "hard-core" material and are capable of distinguishing that material from other works dealing with sex are afforded a non-analytical, but nonetheless accurate method of distinguishing that which is "obscene" from that which is not. For only material properly classified as "hard-core" meets the standard of obscenity enunciated by this Court.

III.

THE MATERIALS AT ISSUE ARE NOT OBSCENE

A. Introduction

We now proceed to discuss the materials at issue and to show that none of them is "obscene" under the standard enunciated by this Court. In examining this material "in the light of the record made in the trial court" (*Jacobellis v. Ohio*, 378 U.S. 184, 196), we first note that the Government offered no affirmative evidence to sustain its burden of establishing that the works were obscene beyond a reasonable doubt (R. 334) other than the works themselves. The Government's case in chief consisted solely of the introduction of the materials mailed and testimony which it now agrees was irrelevant.

B. Eros

Eros, until discontinuance of publication following the indictment in this case, was issued as a hard-cover quarterly periodical at a regular subscription price of \$25.00 a year (Exs. G10-13, R. 170). It is the fourth issue²⁰ with which we are concerned.

²⁰ No action, civil or criminal, state or federal, was ever instituted against the first three issues.

The Government concedes that Eros is not "hard-core pornography" (R. 349).

(1) **Redeeming Social Importance**

A reading of this issue of Eros shows much of obvious merit. Tastes may differ, but few readers would find nothing of intellectual or emotional appeal. Dwight Macdonald saw merit in the text and illustrations of the articles "Love in the Bible", "Jewel Box Revue", "Letter from Allen Ginsberg", "New Twists on Three Great Trysts", "The Natural Superiority of Women as Eroticists", "Black and White in Color" and "Lysistrata". He classified "Was Shakespeare a Homosexual?" as "mediocre" and "Bawdy Limericks" as "vulgar" but not "obscene or pornographic" (R. 239-240).

Professor Janson testified that "in terms of the material contained therein, in terms of the graphic layout, and the taste displayed in the presentation of this material [Eros] is certainly the equal of any magazine being published today" (R. 222). He gave a detailed exposition of the identity of numerous works of art found in the issue (R. 219-221), and was unreserved in his praise of the photographic essay "Black and White in Color". He referred to the photographer's "extraordinary sense of form and composition" and "awareness of compositional devices and patterns that have a long and well-established history in western art" (R. 221). He pointed out how the "contrast in the color of the two bodies * * * has presented [the photographer] with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts" (R. 222). In summary,

he stated, "I cannot imagine the theme of [interracial love] being treated in a more lyrical and delicate manner than it has been done here" (R. 221).

The trial judge disagreed as to the overall merit of *Eros*. He condemned "Black and White in Color" as having "all the requisite elements of obscenity" (R. 364). He similarly condemned other articles, including some singled out by Mr. Macdonald for special praise. He acknowledged that *Eros* had "items of possible merit" (R. 363), but never indicated which they were. The court below found only "bits of non-statutory material"²¹ (R. 389, 390) and nothing of value.

These conclusions are insupportable. *Eros*, as a whole, cannot be deemed to be "utterly without redeeming social importance". The uncontradicted testimony of Mr. Macdonald and Professor Janson, and the fact that such testimony is consistent with any reasonable appraisal of *Eros* itself, precludes a finding that "*Eros* has not the slightest redeeming social, artistic or literary importance or value taken as a whole" (R. 353).²² "The trier of facts under proper circumstances may reject expert testimony and reach a conclusion based upon its own knowledge, experience and judgment. However, it must fairly appear from the record that the fact finder had knowledge and experience relative to the subject matter." *Cullers v.*

²¹ The trial judge named those articles which seemed to him "innocuous, only slightly erotic and possibly not obscene in and of themselves" (R. 363-364). They totalled more than two-thirds of the issue.

²² We believe the same conclusion would be reached if *Eros* were to be considered on an article by article basis, but since the Government stipulated that the indictment charges that *Eros* is obscene "when considered as a whole" (R. 149), we do not argue this point.

CIR, 237 F. 2d 611, 616 (8 Cir. 1956); *Pittsburgh Hotels Co. v. CIR*, 43 F. 2d 345, 347 (3 Cir. 1930).

It does not appear that the trial court had any special knowledge on matters literary or artistic. What the trial judge did then was to "arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence". *Alvary v. United States*, 302 F. 2d 790, 794 (2 Cir. 1962). See also, *Cullers v. CIR*, 237 F. 2d 611, 616 (8 Cir. 1956); *Gordon v. CIR*, 268 F. 2d 105, 107 (3 Cir. 1959); *Yip Mie Jork v. Dulles*, 237 F. 2d 383, 384 (9 Cir. 1956); *Stevens v. Continental Can Co.*, 308 F. 2d 100, 104 (6 Cir. 1962).

(2) Pruriency

Drs. McCormick and Bennett both testified that a reading of *Eros* would not cause the average person to have morbid or shameful sexual desires (R. 211-212, 264-265). There are passages in *Eros* which are erotically stimulating (R. 212-214, 265), but erotic stimulation is not the equivalent of "pruriency", and when considered as a whole *Eros* is not even erotically simulating. Moreover, as Dr. McCormick testified, those passages of *Eros* which are sexually stimulating, even if considered as isolated excerpts, do not evoke a morbid and unhealthy sexual response in the average person (R. 214).

The trial judge nevertheless found that "*Eros* appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 353), and the court of appeals said that *Eros*' "basic material predominantly appeals to prurient interest" (R. 389).

The Government offered no testimony to establish *Eros* had "prurient interest appeal", and all the evi-

dence is otherwise. The trial judge did not claim any special competence in these matters, nor did he find that Drs. McCormick and Bennett had lied on the witness stand. One is left to conclude that his finding that Eros "appeals predominantly, taken as a whole, to prurient interest of the average adult reader" was predicated upon a mistaken notion of the meaning of the term or a highly personalized view of what would evoke the prurient interest of the average person.

(3) Patent Offensiveness

Dwight Macdonald, a literary critic and expert on mass culture, testified at length concerning the rapid changes over recent years in society's toleration of sexual depiction in books, magazines and motion pictures (R. 230-235). He stated without contradiction that Eros did not go beyond the customary limits of candor that society now tolerates in its literature and that in fact it falls considerably within those limits (R. 237-238). Arthur J. Galligan testified as to books and periodicals which are found prominently displayed for public sale on major newsstands and in bookstores in New York and in Philadelphia (R. 242-253). Items purchased at these newsstands and bookstores were offered in evidence (Exs. D10-43, R. 256). The trial court admitted all the evidence bearing upon community standards, including Mr. Macdonald's testimony that Eros was well within those standards.

In the Special Findings of Fact, entered 54 days after finding Ginzburg and Eros Magazine guilty, the trial court failed to make a finding that Eros was patently offensive or that it substantially exceeded customary limits of candor in describing or represent-

ing nudity or sex (R. 353).²³ Some three and a half months later in an opinion denying the motion for a new trial, the trial judge attempted to fill the gap.²⁴ First he brushed aside defendants' exhibits with the *ipse dixit*: "Doubtless but a sliver of the community reads such things and there is no doubt the community as a whole does not necessarily tolerate them" (R. 367). Then characterizing himself "as a fact finder * * * who is aware of all types of material sold, tolerated and not tolerated by the community as a whole" he purported to find that Eros and the other material at issue "unequivocally" exceed "the standard" (R. 367). The court did not identify the type of material which he considered as establishing that standard, and his conclusion is in direct contradiction with the expert testimony of Mr. Macdonald. We believe that comparison of Eros with books such as "Tropic of Cancer", "Lady Chatterley's Lover", "Naked Lunch", and Frank Harris' "My Life and Loves", and periodicals such as those in evidence in this case,²⁵ inexorably leads to the conclusion reached by Mr. Macdonald.

²³ See Point IV, pp. 57-58, *infra*.

²⁴ But an opinion, especially one issued long after findings were made, cannot be used to supply an essential but missing finding. *Stone v. United States*, 164 U.S. 380, 383 (1896); *United States v. Esnault-Pelterie*, 299 U.S. 201, 206 (1936); *Crocker v. United States*, 240 U.S. 74, 78 (1916).

²⁵ The periodicals in evidence are: *Rogue* (Ex. D11; R. 256); *Nymph* (Ex. D18; R. 256); *Tie-Toe* (Ex. D19; R. 256); *Pastime* (Ex. D20; R. 256); *Adam* (Ex. D21; R. 256); *Satan's Scrap Book* (Ex. D22; R. 256); *Kiss* (Ex. D23; R. 256); *Stark* (Ex. D24; R. 256); *French Frills* (Ex. D25; R. 256); *Hip and Toe* (Ex. D26; R. 256); *Vue* (Ex. D27; R. 256); *Tip-Top* (Ex. D31; R. 256); *Snap* (Ex. D32; R. 256); *Twilight* (Ex. D33; R. 256); *Zoftick* (Ex. D34; R. 256); *Ruby* (Ex. D35; R. 256); *Torch* (Ex. D36; R. 256); *Nude World* (Ex. D37; R. 256); *Gymnos* (Ex. D38; R. 256); *Escapade* (Ex. D40; R. 256); *Cavalcade* (D41; R. 256); *Scamp* (D42; R. 256).

(4) Summary

Eros has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and the Government concedes that it is not. Eros is not "obscene".

C. The Housewife's Handbook

(1) Redeeming Social Importance

The Handbook is not a work of fiction. It is a true, frank and comprehensive autobiography of a woman's thoughts, feelings and reactions (R. 227).

The Handbook is divided into two parts entitled "Experiences" and "Miscellaneous Concepts". In "Experiences", Mrs. Serett discusses her sexual attitudes, problems and occasional satisfactions against the background of family prudery (*e.g.*, Ex. G17, pp. 23, 114), three marriages (at pp. 65-68, 87-145, 145-206), and the birth and rearing of children (at pp. 90, 101, 116-117, 126-127, 203-204). In "Miscellaneous Concepts", Mrs. Serett, building from the foundation of "Experiences", summarizes and generalizes that which her experiences have taught her (at pp. 216-240).

The Handbook is a document of social importance for three separate reasons—it provides valuable information, it contains protected social commentary, and there are those who think it is useful to persons, particularly women, whose normal sexual drives beset them with feelings of guilt.

(a) *Informational Value*

In a preface to the Handbook, Dr. Albert Ellis, a noted authority in the field of human sexual behavior,²⁶ states that "the Handbook makes a distinctly valuable contribution to sexual knowledge" (at p. 8). Lamenting the near total lack of "straight-forward accounts [by women] of their sexual experiences and sensations", Dr. Ellis commends the book as one which "should be in the library of every serious researcher and professional worker in the field of sex, love, marriage, and family relations" (at pp. 8-9). Mrs. Serett testified that the book had in fact been ordered and reordered by doctors, ministers and at least one medical school²⁷ (R. 225-226).

Dr. McCormick testified that the Handbook gives "a realistic picture of a woman's attitude and activi-

²⁶ Dr. Albert Ellis is a Fellow of the American Psychological Association and has been President of its Division of Consulting Psychology and a member of its Council of Representatives. He has been Vice-President of the American Academy of Psychotherapists; Chairman of the Marriage Counseling Section of the National Council on Family Relations, and a member of the Executive Committee of the American Association of Marriage Counselors. He is a consultant in Clinical Psychology to the Veterans' Administration, was formerly Chief Psychologist of the New Jersey State Diagnostic Center, and later Chief Psychologist of the New Jersey Department of Institutions and Agencies. He has served as Associate Editor of the *Journal of Marriage and the Family*, the *International Journal of Sexology*, *Advances in Sex Research*, the *Journal of Sex Research and Rational Living*, and has published over two hundred papers in psychological, psychiatric, and sociological journals, periodicals and anthologies. He has authored or edited twenty-four books and monographs on the subject of sex and sexual practices.

²⁷ On sentencing, the Government conceded that many physicians had purchased the Handbook (R. 370).

ties with respect to sex" (R. 210) and "would be quite useful as an educational instrument" (R. 216).²⁸ Dr. Bennett testified that people can find out about sex "from such books as the 'Housewife's Handbook'" (R. 261).

The validity of these observations, which stand uncontradicted on the record, are self-demonstrating. A work, such as the Handbook, that provides truthful, informative and useful data concerning the sex side of life is of social value and protected by the First Amendment.

(b) *Social Comment*

Mrs. Serett, as she testified she set out to do (R. 226), advocates the reshaping of society's concept of

²⁸ The book's informational importance is further supported in book reviews by Dr. William J. Bryan, Jr. and Dr. Robert M. Frumkin (Exhibits Annexed to Motion to Dismiss Indictment, R. 16-19); and letters of comment by such persons as Dr. Theodor Reik (*Id.* R. 19); Author Lucy Freeman (*Id.* R. 20); Nobel Prize Winner Hermann J. Muller, Ph.D., D.Sc. (*Id.* R. 20-22); William L. Purcell (*Id.* R. 32-33); Eugene B. Nadler, Ph.D. (*Id.* R. 42); Samuel Baron, Ph.D. (*Id.* R. 54-55); Dr. W. A. Black (*Id.* R. 61-62); S. J. Fields, Ph.D. (*Id.* R. 73); Maxwell Geismar (*Id.* R. 80-81); Dr. George J. Wittenstein (*Id.* R. 86); Phyllis C. and Eberhard W. Kronhausen, Ed.D. (*Id.* R. 87-89); Dr. Edward C. Falk (*Id.* R. 94); William M. Smith, Ph.D. (*Id.* R. 94-96); Rev. Quentin L. Hand, Ph.D. (*Id.* R. 109-110); Henry Paar, Ph.D. (*Id.* R. 141-142); Carlos A. Allen, Jr., Ph.D. (*Id.* R. 143-144). These reviews and letters were stricken when offered in support of the motion to dismiss the indictment, but they should be accorded some weight as written, extra-judicial commentary in support of the Handbook's claim to social importance. See *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964); *Besig v. United States*, 208 F. 2d 142, 147 (9 Cir. 1953); *Grove Press v. Christenberry*, 175 F. Supp. 488, 497, 502 (SDNY 1959), and see also affirming opinion, 276 F. 2d 433, 437, *ftn.* 6 (2 Cir. 1960); *United States v. One Book Entitled Ulysses*, 5 F. Supp. 182 (SDNY 1933), *aff'd* 72 F. 2d 705 (2 Cir. 1934).

sexual normalcy and urges that women must be given at least equal consideration in the reshaped concept. In "Experiences" she refers to sexual encounters with men who were interested solely in their own sexual gratification (at pp. 75, 76-77, 86, 148-149) and shows how greater pleasure is achieved by both parties when the male is concerned with the female's satisfaction (at pp. 44-46, 50-51, 77-78, 120-121).

In "Experiences" she challenges the view that only penile-vaginal intercourse is "acceptable" and shows that other forms of sexual activity, even those held to be criminal, are enjoyable and normal (at pp. 46, 52-53, 112-114, 119-125, 140-142). In "Miscellaneous Concepts" she sums up these experiences and decries the hypocrisy of laws that forbid sexual activity commonly practiced (at pp. 225-227, 230-238).

In "Experiences" she pierces the hambug of typical parental response to children's sexual questions and shows the advantage of correct information communicated in an unshameful way (at pp. 19, 26-27, 32-34, 90, 114-115, 126-127, 154); in "Miscellaneous Concepts" she drives the lesson home (at pp. 216-221).

In "Experiences" she tells the story of her two abortions and of a friend who died from a home-brewed abortifacient (at pp. 47-50, 62-65, 156-157). In "Miscellaneous Concepts" she urges repeal or modification of our abortion laws (at 227-230).

Mrs. Serett has these and many other things to communicate to those who would listen.

(c) *Utility*

Dr. Bennett testified that persons with anxieties about sex "may even be turned to a fuller enjoyment

of life, as I think might happen to many as a result of reading Mrs. [Serett's] book" (R. 262). Reverend von Hilsheimer testified that the Handbook had been recommended by a colleague as a "useful tool in therapy" and that he had used it in pastoral and psychological counseling (R. 289). He found that the book tended to relieve the sense of shame that most women have about their sexual thoughts and activities by demonstrating "that their own experiences are not unusual, that their sexual failures are not unusual" (R. 290). He found the book to be more helpful than conventional marriage manuals for use with his parishioners, underprivileged members of minority groups.

The Government's rebuttal witnesses testified, on the other hand, that the Handbook had no value for treatment of persons with psychiatric problems (R. 335-344).

The trial judge found that there was "no credible evidence that the Handbook ha[d] the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine" (R. 352, 366), thus rejecting the sworn testimony of Reverend von Hilsheimer, Dr. Bennett, and Mrs. Serett that the book could be used to beneficial purpose.²⁹ Reverend von Hilsheimer's testimony was

²⁹ Similar statements attesting to the Handbook's usefulness were received from Dr. Thomas E. Rardin (Exhibits Annexed to Motion to Dismiss Indictment, R. 23); Dr. Wallace C. Ellerbroek (*Id.* R. 29); Dr. Stanford R. Gamm (*Id.* R. 30); Robert A. Harper, Ph.D. (*Id.* R. 35); Dr. Abraham J. Rosenfeld (*Id.* R. 49); Richard P. Walsh, Ph.D. (*Id.* R. 53-54); Dr. Harry Benjamin (*Id.* R. 57); Jesse H. Harvey, Ph.D. (*Id.* R. 66-71); Glenn C. Martin (*Id.* R. 78); Dr. Dean R. Archer (*Id.* R. 84); Phyllis C. and Eberhard W. Kronhausen, Ed.D. (*Id.* R. 87-89); Robert L. Caldwell, D.D. (*Id.* R. 97-98).

rejected because he had allowed "teen-age children" to read the Handbook and was thought to advocate that the book "be in every home and available for teenagers for guidance in sex behavior" (R. 366).³⁰ The trial court's interrogation of this witness made it clear that he strongly differed with Reverend von Hilsheimer's views on the need for sex education of young people (R. 296-297, 300-305), but testimony cannot be rejected simply because the trier of fact disagrees with the witness' philosophy. What is more, there was no basis whatever for rejection of Dr. Bennett's expert testimony or Mrs. Serett's statement that many physicians and other professionals purchase and use the book.

On the basis of all the evidence the trial court should have found that the Handbook possessed the claimed utility. At the very least, since the experts disagreed as to whether the book was useful to persons with sexual problems, the trial court should have found that its value "for the treatment of individuals in clinical psychiatry, psychology, or any field of medicine" (R. 352) was debatable. But even that finding would not support the conclusion that the book is "utterly without redeeming social importance".

The existence of legitimate debate over this aspect of claimed value argues for the book's protection, not its suppression. *Kingsley International Pictures v. Regents*, 360 U.S. 684, 689 (1959); *Hannegan v. Esquire*, 327 U.S. 146, 157-158 (1946). The First Amendment requires that all such debates be resolved in the marketplace of ideas, not by judicial fiat.

³⁰ But see actual testimony at R. 296.

Moreover, "clinical utility" was not the Handbook's only claim to importance. Neither the trial court nor the court below gave consideration to the Handbook's social commentary or its informational importance as a true exposition of a woman's sexual attitudes, experiences and emotions. These elements preclude a finding that the Handbook is "utterly without social importance" and support the book's claim to constitutional protection.

(2) Pruriency

The Handbook's style is not salacious or suggestive. It is as forthright as an anatomical chart. Unlike works which are designed to have prurient interest appeal (see, *e.g.*, Exs. D5, D6, D7 and D8), the Handbook is not made up of a succession of increasingly erotic scenes without distracting non-erotic passages. It describes and deals with the realities of the author's life (R. 200, 227, 290), and is replete with such non-erotic elements as money worries (Ex. G17, 63, 111-112, 130, 183-184, 188), arguments with her spouse (*Id.*, 61-62, 64, 187-188), childbirth (*Id.*, 57-58, 97-98, 160-162), fear of pregnancy (*Id.*, 47-49), menstruation (*Id.*, 28, 170), divorce (*Id.*, 142, 145, 206), abortion (*Id.*, 63-65, 156-157), fear of venereal disease (*Id.*, 71-74) and illness of children (*Id.*, 101, 203-204).

There was no testimony whatever that the Handbook would appeal to the prurient interest of the average adult reader. All the testimony was to the contrary. Dr. McCormick testified that the predominant effect of the Handbook was not to create in the average person a morbid or shameful desire or longing with respect to sex (R. 206) and that the writing was not morbid and would not "tend to corrode and to turn [a] person

against himself in the process of reading" it (R. 210). Dr. Bennett testified that the book would not appeal to the prurient interest of an average mature person (R. 264).

(3) Patent Offensiveness

Dwight Macdonald testified that the Handbook does not go "substantially beyond the customary limit of candor that society * * * permits in its literature at the present time" and that its sexual descriptions were less explicit than those in "Lady Chatterley's Lover" (R. 235-236). "Lady Chatterley's Lover" contains "a number of passages describing sexual intercourse in great detail with complete candor and realism. Four-letter Anglo-Saxon words are used with some frequency." *Grove Press v. Christenberry*, 175 F. Supp. 488, 500 (SDNY 1959), aff'd 276 F. 2d 433 (2 Cir. 1960). Mrs. Serett does not use "gutter words". Although the book is an autobiography, in first person form, it may be compared with third-person treatises on sexual techniques, and these treatises, customarily described as sex or marriage manuals, contain more graphic and detailed descriptions of sexual acts and practices than are found in the Handbook.⁸¹

The uncontradicted testimony and comparison of the Handbook with novels and marriage manuals in current circulation establishes that the Handbook does not go substantially beyond customary limits of candor in its description of sexual matters.

⁸¹ See, e.g., "Married Love" by Dr. Marie C. Stopes; "Psychology of Sex" by Havelock Ellis; "Ideal Marriage" by Theodore H. Van de Velde; "The Sexually Responsive Woman" by Drs. Phyllis and Eberhard Kronhausen; and "Love Without Fear" by Dr. Eustace Chessier.

(4) Summary

The Housewife's Handbook has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and is not "obscene" when measured by the standards enunciated by this Court.

D. Liaison

(1) Redeeming Social Importance

Liaison was published as a biweekly periodical. There were many issues published, but only the first, the subject of indictment and conviction in this case, was attacked as "obscene". This issue, except for the long article entitled "Slaying the Sex Dragon", was written by Jack Darr (R. 179-181), a government witness, who testified that his "employment was terminated" soon thereafter (R. 183).

"Slaying the Sex Dragon" is a report of an "at home" interview with Dr. Albert Ellis on the occasion of publication of his book *Reason and Emotion in Psychotherapy*. The report quotes Dr. Ellis in his espousal of freedom of sexual conduct. These views are highly controversial and most members of our society would find them unacceptable, but Dr. Ellis is a highly credentialed psychologist³² whose views on sex must be considered seriously. Dr. Ellis makes his argument forcefully by language and examples charged with shock value and calculated to compel the reader to react, think, and perhaps accept.³³ The trial judge

³² See p. 47, fn. 26, *supra*.

³³ Cf. "Lady Chatterley's Lover" by D. H. Lawrence.

said that Liaison "advocated [the idea] of complete abandon of any restraint with regard to any form of sexual expression". This is an accurate characterization of Dr. Ellis' position, but advocacy of this idea is as much entitled to protection as advocacy of "socialism or the single tax". *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959).

(2) Patent Offensiveness

Dwight Macdonald testified that Liaison, Vol. 1, No. 1, was tasteless, vulgar, and repulsive, but that based upon his observation of the literary scene, it does not go substantially beyond the limits of candor which society now tolerates in descriptions or discussions of sexual matters (R. 236-237). Cf. *United States v. Keller*, 259 F. 2d 54, 58 (3 Cir. 1958): "Some of the words complained of * * * are vulgar and perhaps repugnant to one of average sensibilities, but a conviction under Section 1463 cannot be sustained on such grounds."

(3) Pruriency

The Government offered no testimony to prove that Liaison had prurient interest appeal to the average person, and the trial court failed to find that it had such appeal.³⁴

Drs. McCormick and Bennett both testified that there was nothing in Liaison which could be erotically stimulating to a normal, average person, and only a class of psychotics, technically termed "paraphilliacs",

³⁴ The court found only that Liaison was "published for the purpose of appealing to the prurient interest of the average individual" (R. 352). See Point IV pp. 57-58, *infra*.

could be stimulated by this material (R. 215, 265-266).

Since nothing in *Liaison* has the "tendency to excite lustful thoughts", *Roth v. United States*, 354 U.S. 476, 487, ftn. 20 (1957), or make the average person "uneasy with desire or longing", *United States v. Keller*, 259 F. 2d 54, 58 (3 Cir. 1958), it could not be held obscene even if it were patently offensive and totally devoid of socially redemptive value.

(4) Summary

Liaison has redeeming social importance, does not predominantly appeal to prurient interest, and does not go substantially beyond the limits of candor that society now tolerates in literature dealing with sexual matters. It is not "hard-core pornography" and is not "obscene" when measured by the standards enunciated by this Court.

E. The Advertising Counts

The Government stipulated that the advertising materials were "not in and of [themselves] alleged to be obscene under 18 U.S.C. § 1461," but that "it [was] the Government's theory of the case that [they] advertised where and how allegedly non-mailable material could be obtained" (R. 148-149).

Since, as we have shown, the convictions on the Handbook counts (11 through 16), the Eros counts (17 through 22) and the *Liaison* counts (23 through 28) must be reversed, the convictions on the advertising counts must be reversed as well.

IV.

**THE TRIAL JUDGE'S FINDINGS DO NOT SUPPORT THE
CONVICTIONS ON THE EROS AND LIAISON COUNTS**

Even if this Court were to conclude, on independent examination, that Eros and Liaison are "obscene", reversal on those counts would nonetheless be required for lack of essential findings.³⁵

Petitioners made a timely request for special findings under Rule 23(c) of the Federal Rules of Criminal Procedure. The court purported to make such findings,³⁶ and "[u]nder this Rule * * * the verdict would be supported or fail of support on the basis of the facts found rather than on the basis of facts which might reasonably be found * * *." *Proceedings of the Institute on Federal Rules of Criminal Procedure*, 5 F.R.D. 184, 199-200 (1945). See also *Wilson v. United States*, 250 F. 2d 312, 324-325 (9 Cir. 1957).

On the Eros counts the trial court failed to find "patent offensiveness",³⁷ and on the Liaison counts, he failed to find "prurient interest appeal",³⁸ and since *Manual Enterprises v. Day*, 370 U.S. 478, 486 (1962),

³⁵ *Supra*, pp. 44-45, 55.

³⁶ But see point V.c, *infra*, pp. 61-66.

³⁷ The court below inexplicably inferred the existence of such a finding from Special Findings of Fact Nos. 16, 17, 18, and 19 (R. 353), none of which deal with the concept known as "patent offensiveness" (R. 391). By way of contrast, the trial judge specifically found that both Liaison and the Handbook went "substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" and were "patently offensive on [their] face" (R. 352, 353; Special Findings 5, 7, 11, 14).

there can be no doubt that for material to be obscene it must be *both* patently offensive *and* appeal to prurient interest.

The absence of an essential finding is deemed a finding against the party having the burden of proof. Cf. *Woods v. Turner*, 172 F. 2d 313, 315 (10 Cir. 1949); *Schioler v. Secretary of State*, 175 F. 2d 402, 403 (7 Cir. 1949); *Switzer Bros. v. Locklin*, 297 F. 2d 39, 45 (7 Cir. 1961). Accordingly, the failure to make findings essential to guilt required acquittal on the Eros and Liaison counts.

V.

ERRORS IN THE TRIAL COURT REQUIRE A NEW TRIAL IN ANY EVENT

A. The Trial Court Erroneously Used Evidence Against One Defendant to Support the Conviction of All

Over objection, the trial judge allowed the Government to introduce testimony and exhibits establishing that Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote to the Postmasters of Blue Ball and Intercourse, Pennsylvania, seeking use of these post offices for Eros' direct mail (R. 153-158, Exs. G 1-2). Although there was no evidence that petitioner Ginzburg knew of or directed Brady's inquiry, or that it was made on behalf of petitioners Documentary

³⁸ The court below held that Special Findings Nos. 11, 12, 13, 14, 15 (R. 352-353) supported conviction on the Liaison counts (R. 391). But the trial court found only that Liaison was "published for the purpose of appealing to the prurient interest of the average individual" (R. 352, Special Finding 12), not that it had such appeal in fact. Compare Special Finding No. 6 on the Handbook and No. 16 on Eros (R. 352-353).

Books, Inc. or Liaison News Letter, Inc., the trial judge, erroneously applying conspiracy doctrine,³⁹ found that *all* the petitioners sought to mail from the Blue Ball and Intercourse post offices "in order that the postmarks on mailed material would further [their] general scheme and purpose" (R. 351, Special Findings Nos. 3 and 4).

The Government offered this testimony and the trial court received it as "clearly go[ing] to intent, as to what the purpose of publishing these magazines was" (R. 155). Indeed, the only evidence the Government offered in its case in chief (other than the material mailed) related to this issue. A reading of the trial judge's findings (R. 351) shows that the Blue Ball and Intercourse testimony was relied upon as relevant, and highly prejudicial, evidence of a specific intent to appeal to prurient interest for a profit. The opinion of the court of appeals demonstrates that that court was also greatly influenced by this evidence (R. 385-386). Nevertheless, the court of appeals held that petitioners were not prejudiced by the erroneous transfers of intent since they had stipulated that they knew the content of the publication each was charged with mailing, and this was the only "intent" the statute required. Thus, the court allowed the prosecution to offer evidence whose capacity to prejudice and inflame is self-evident and then on appeal to insist that such evidence was not relevant in the first place. This Court's holding in *Bram v. United States*, 168 U.S. 532, 541, (1897) clearly prohibits such a practice:

"the prosecution cannot, on the one hand, offer evidence to prove guilt, and which by the very

³⁹ The indictment did not charge conspiracy and no conspiracy was established.

offer is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered * * * was not prejudicial, because it did not tend to prove guilt."

The Blue Ball and Intercourse testimony, not being relevant to the issues in the case, should have been excluded. But once admitted at the Government's insistence and relied on by the trial court to support the convictions of all petitioners, the convictions could not have been sustained on appeal on the premise that petitioners could have been found guilty on some other theory, *Wilson v. United States*, 250 F. 2d 312, 325 (9 Cir. 1957). This is a violation of due process. *Russell v. United States*, 369 U.S. 749, 766 (1962); *Cole v. Arkansas*, 333 U.S. 196 (1948). For this reason alone the convictions of Ginzburg, Liaison and Documentary Books must be reversed.

**B. The Trial Court Admitted and Relied Upon
Evidence of the Handbook's Effect on Adolescents**

The trial court permitted Dr. Nicholas Frignito, a Government rebuttal witness, to testify that to "the adolescent boy and girl [reading the Handbook] is certainly a very dangerous thing" (R. 321); "for an adolescent boy * * * what this type of book results in causes delinquency" (R. 322); "[t]o an average boy, I would say it would be very disturbing and certainly would possibly, and most likely excite him to sexual misconduct." When asked: "What kind of sexual misconduct?", he replied: "it would lead to self-abuse, masturbation and that would lead to other types of sexual activity" (R. 323-324).

The trial judge overruled petitioners' repeated objections to this testimony (R. 321, 322, 323, 324) and demonstrated that he considered the book's effect on adolescents to be a relevant determinant of obscenity (R. 366, 368). The Handbook's possible effect on adolescents was the principal subject matter of the trial judge's interrogation of defense witness Dr. Bennett and Reverend von Hilsheimer (R. 271-273, 296-298, 300-307); his opinion characterized the Handbook as a guide to teen-age "misbehavior" (R. 366); and his concept of the relevant community to be protected against obscenity included "children of all ages" (R. 367). Despite the trial court's reliance on the Handbook's purported effect on adolescents, the court of appeals found "no error" in the admission of the Frignito testimony.

In *Volanski v. United States*, 246 F. 2d 842 (6 Cir. 1957), another obscenity case tried to the district court without a jury, a psychiatrist was permitted "to state his expert opinion that the pictures would have an undesirable effect upon juveniles. That the court's decision was based in large part on this evidence [was] revealed by the trial judge's oral opinion" (*Id.* at 843). In reversing Volanski's conviction, Judge (now Mr. Justice) Stewart said: "The admission of this evidence was prejudicial error" (*Id.* at 844). The same considerations which led to reversal in *Volanski* require reversal of convictions on the Handbook counts.

C. The Trial Judge Denied Petitioners the Procedural Rights Guaranteed by Rule 23(c), Federal Rules of Criminal Procedure

At the close of trial, and before verdict, petitioners' counsel requested the trial judge to find the facts specially as provided by Rule 23(c) of the Federal Rules

of Criminal Procedure (R. 348). The prosecutor asked for "an opportunity to explore this", and although Rule 23(c) gives a court no discretion to deny the request,⁴⁰ the trial judge announced "[t]he ruling will be reserved" (R. 348). Later in the day, during the course of summation, the prosecutor announced that "the Government has no objection to specific findings of fact as requested by the defendants" (R. 348), but the court still reserved ruling on petitioners' request saying: "I will determine that before tomorrow morning; maybe late today, and I will let you all know" (R. 349). The following day, upon the convening of court, the judge announced:

"In the matter of the United States of America versus Ralph Ginzburg, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc., I find the defendants guilty on all counts.

"There was a request by counsel for the defendants in regard to special findings of fact, and I will find the facts especially as requested by defendants' counsel. At the earliest possible time they will be found.

"Meanwhile, I would like to request the Government through Mr. Creamer to submit to me proposed findings." (R. 349)

Petitioners thereupon filed a motion in arrest of judgment or, in the alternative, for a new trial on the ground, *inter alia*, that the trial court failed to make findings as required by Rule 23(c) (R. 350). After this motion was filed, the Government submitted proposed findings *ex parte*. Petitioners do not know precisely when the proposed findings were given to the

⁴⁰ *United States v. Morris*, 263 F.2d 594 (7 Cir. 1959).

trial judge. A copy was not served on petitioners' counsel nor was the original ever filed in the docket. Fifty-four days after adjudging petitioners "guilty on all counts" the court handed down "Special Findings of Fact" purportedly made "pursuant to Rule 23(c)" (R. 351).

The Government then filed its long-delayed answer to petitioners' motion for arrest of judgment or a new trial and subsequently the court denied the motion. Explaining why he had found petitioners guilty before making special findings and why he had asked the prosecutor to provide the findings to support the convictions, the court said:

"[T]his was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. * * * It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer." (R. 360)

This statement standing alone is sufficient to require reversal. The court's verdict rendered in advance of (1) ascertainment "of the facts [which were] not clear and precise", (2) careful "consideration of all the legal ramifications of the factual setting", and (3) "detailed legal research", was no less a prejudgment than if the court had pronounced petitioners guilty in advance of trial.

The trial judge claimed that petitioners waived their right to have special findings issued before or contem-

poraneously with the general verdict by standing silent in the face of a preannounced delay and by not raising a timely objection after the verdict of guilt was announced. But the record shows beyond contradiction that the trial judge, apparently believing that he had discretion to grant or deny the request for special findings, announced that he would rule thereon "before tomorrow morning; maybe late today". When court reconvened, the trial judge pronounced petitioners guilty as the first order of business and then announced that he would grant the request for special findings (R. 349). Petitioners made timely objection to the court's failure to make special findings at or before the general finding of guilt in the only manner provided, by filing a motion for a new trial, which was and is the only relief to cure this error.

"Rule 23(c) contemplates a single set of special findings entered at the time of the entry of the general findings." *Benchwick v. United States*, 297 F. 2d 330, 335 (9 Cir. 1961). Special findings under Rule 23(c) serve much the same function in a non-jury case as instructions do in a jury case. *United States v. Palermo*, 259 F. 2d 872, 882 (3 Cir. 1958). Just as a jury must apply the proper legal standards in arriving at its verdict, so must a trial judge apply the proper legal standards in arriving at his verdict. *Wilson v. United States*, 250 F. 2d 312, 324 (9 Cir. 1957). And just as a trial judge cannot instruct the jury after it returns its verdict, so a trial judge cannot instruct himself after he returns his verdict. How much greater is the error when the post verdict instruction is given *ex parte* by the prosecution! Findings made in such a manner deprived petitioners of all the safeguards Rule 23(c) was designed to afford.

In *Roberts v. Ross*, 344 F. 2d 747 (3 Cir. 1965), a civil case decided after affirmance of the criminal convictions here, the court below gave comprehensive consideration to the requirements of fact finding. The court said:

"[W]e have observed in this case and in a number of others which have been brought here from the district court for review that the judge of the court has followed the practice of announcing his decision for the plaintiff or the defendant substantially in the form of a general verdict, either in a written order or by communication to counsel, and of thereupon directing counsel for the prevailing party to prepare and submit findings of fact, conclusions of law and a form of judgment. The trial judge's order has not been accompanied by an opinion setting out, even summarily, the facts and legal conclusions which have brought him to his decision.

* * *

We strongly disapprove this practice. For it not only imposes a well-nigh impossible task upon counsel but also flies in the face of the spirit and purpose, if not the letter, of Rule 52(a).^[41] The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a

⁴¹ The pertinent portion of Rule 52(a), Federal Rules of Civil Procedure provides:

"In all action tried upon the facts without a jury * * * the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

Rule 23(c), Federal Rules of Criminal Procedure provides:

"In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the basis of his decision when it is made. Findings and conclusions prepared *ex post facto* by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule." (*Id.* at 751-752.)

The court reversed the civil judgment.⁴² Should fact finding requirements be less stringent in a criminal case, especially one involving "regulation of obscenity" which must "embody the most rigorous procedural safeguards"? *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Smith v. California*, 361 U.S. 147 (1959). When a trial judge convicts, delegates to the prosecutor the responsibility to prepare findings to support the conviction, receives these findings *ex parte* and off-the-record, and purports to make findings fifty-four days after he has adjudged petitioners to be guilty, can judgments of conviction—including a sentence of five years imprisonment—be sustained?

⁴² See also *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 259 F.2d 398 (5 Cir. 1958); *Mesle v. Kea Steamship Corporation*, 260 F.2d 747, 750 (3 Cir. 1958); and Judge J. Skelly Wright, *The Non-Jury Trial-Preparing Findings of Fact and Conclusions of Law, Seminars for Newly Appointed United States District Judges*, West Pub. Co., 1963, p. 166.

CONCLUSION

For all the foregoing reasons, the convictions must be reversed.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved:

First Amendment: Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Fifth Amendment: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment: In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation * * *.

Statute Involved:

§ 1461. *Mailing obscene or crime-inciting matter:*

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; and

* * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or

disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Rule Involved:

Federal Rules of Criminal Procedure. Rule 23. Trial by Jury or by the Court:

* * *

(c). Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION
OF PENNSYLVANIA, *AMICI CURIAE***

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Interest of *Amici*

The American Civil Liberties Union and its Pennsylvania affiliate, the Pennsylvania Civil Liberties Union, are organizations dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

Freedom of expression is a particular facet of this concern. Accordingly, this brief of *amici curiae* is filed because it appears to us that the federal felony conviction of a publisher for using the mails to distribute to the public books and magazines about whose aesthetic merit responsible opinion varies widely, abridges the freedom of

expression guaranteed by the First Amendment—both as to the right of the distributor to disseminate and the corresponding right of members of the adult public to exercise their freedom of choice in determining for themselves what forms of artistic and literary expression they will experience.

Our interest is not in the protection of smutty books and magazines, nor do we presume to judge the artistic merit of the publications whose distribution caused petitioners' conviction here. Neither is our interest limited to our objection to the suppression of the particular books and magazines here involved. Our concern is that, suppressed in addition to these publications, is the courage of this distributor and others to continue to disseminate the entire spectrum of artistic and literary creativity, for fear of future prosecutions.

In the firm belief that "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit,"¹ and in the hope that it will be of some assistance to the Court in dealing with its great task of preserving freedom of expression from "insidious encroachment by men of zeal, well-meaning but without understanding,"² this brief is filed.

The written consent of the parties to this appearance of *amici* has been filed with the Clerk of the Court.

¹ *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 695 (1959) (Frankfurter, J., concurring).

² *Olmstead v. United States*, 277 U. S. 438, 479 (1928) (Brandeis, J., dissenting).

Statement of Facts

Petitioners were indicted and convicted on twenty-eight counts of mailing obscene publications and advertisements for such publications in violation of 18 U. S. C. §1461. The publications in issue were a magazine, *Eros*, Vol. 1, No. 4, a book, *The Housewife's Handbook of Selective Promiscuity*, and a newsletter, *Liaison*, Vol. 1, No. 1.

At the trial before the District Court, sitting without a jury, it was stipulated that petitioners had mailed the challenged publications with knowledge of the contents and, after presenting some evidence to show criminal intent, the prosecution introduced the publications and rested. A defense motion for acquittal was denied.

For its case, the defense offered the expert testimony of a clinical psychologist, a practicing psychiatrist, literary critic Dwight MacDonald, the chairman of the fine arts department of New York University and a Baptist minister, who testified in sum that the publications, while admittedly erotic in character, did not go beyond customary limits of candor, were not patently offensive and had no tendency to arouse the prurient interest of the average adult, that some of the material in *Eros* had considerable literary and artistic merit, that the *Housewife's Handbook* involved the advocacy of ideas and had educational and clinical value. The prosecution introduced rebuttal testimony of two psychiatrists and a Baptist minister. Their testimony was admitted for the limited purpose of rebutting the expert testimony offered by the defense and not as affirmative evidence in the prosecution's case in chief.

All of the publications were held to be obscene within the meaning of *Roth v. United States*, 354 U. S. 484 (1957), and petitioners were found guilty on all counts.

Petitioner Ginzburg, a first offender, was sentenced to five years imprisonment and a fine of \$28,000.00. The corporate petitioners were fined a total of \$14,000.00. The Court of Appeals for the Third Circuit affirmed the convictions. Sentences have been stayed pending determination of the validity of the convictions by this Court.

Summary of Argument

Inasmuch as the petitioner was convicted on counts of mailing obscene publications and advertisements for such publications in violation of 18 U. S. C. §1461 under the verbal formula for determining what is obscene for constitutional purposes, announced in *Roth v. United States*, 354 U. S. 476 (1957), and interpreted in subsequent cases, it is appropriate for *amici curiae*, in urging reversal of the conviction below, to re-examine that holding.

In light of the imperatives of freedom of expression and the decisions and sociological studies since the enunciation of the *Roth* rule, we urge the Court to reconsider certain aspects of that decision.

We contend that:

I. All utterances are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger that they will bring about a substantive evil to society unless restrained.

II. The test of obscenity as announced in *Roth v. United States* and interpreted in subsequent decisions is vague and unworkable and tends to inhibit the dissemination of expression which is not obscene and

clearly within the protective scope of the First Amendment.

Each of these contentions will be discussed in sequence and detail below.

ARGUMENT

I.

All utterances are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger that they will bring about a substantive evil to society unless restrained.

When this Court held in *Roth v. United States*, 354 U. S. 476, 485 (1957) "that obscenity is not within the area of constitutionally protected speech or press" it embarked upon a philosophic voyage in the law of obscenity whose consequences to freedom of expression can only be unfortunate, to say the least.

Until *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), this Court had never held that any form of utterance was *per se* outside the scope of the protection of the First Amendment. All forms of expression were subjected, rather, to the "clear and present danger" standard³ within

³ See Holmes, J., for the Court in *Schenck v. United States*, 249 U. S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." See also *Abrams v. United States*, 250 U. S. 616 (1919) (dissenting opinion), *Gitlow v. New York*, 268 U. S. 652 (1925) (dissenting opinion), *Whitney v. California*, 274 U. S. 357 (1927) (concurring opinion of Brandeis, J.). And see *Bridges v. California*, 314 U. S. 252, 263, 265 (1941)

the framework of the First Amendment to determine whether governmental restraint was constitutionally permissible.

In *Chaplinsky*, however, the Court for the first time articulated a concept of "unprotected speech", based not upon its dangerous consequences to society, but upon its lack of social value. Upon facts which might well have been similarly resolved with less violence to settled First Amendment principle,⁴ Mr. Justice Murphy stated the proposition broadly:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁵

which held that freedom of expression was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

⁴ The epithets and vituperative remarks here involved and described as "fighting" words might have been disposed of as "words that . . . have all the effect of force," *Schenck v. United States*, 249 U. S. 47, 52 (1919) or as expression "so closely brigaded with illegal action as to be an inseparable part of it," *Roth v. United States*, 354 U. S. 476, 514 (1957) (Douglas, J. dissenting) but within the protection of the First Amendment.

⁵ *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572 (1942).

Ten years later, in *Beauharnais v. Illinois*, 343 U. S. 250 (1952), a different class of expression—libel—was exempted from the protection of the First Amendment and measurement against “clear and present danger” standards. In upholding the constitutionality of a state statute prohibiting group libel, Justice Frankfurter, speaking for a closely divided Court,⁶ said:

“Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase ‘clear and present danger’. Certainly no one would contend that obscene speech for example, may be punished only upon a showing of such circumstances.⁷ Libel, as we have seen, is in the same class.”⁸

In *Roth v. United States*, 354 U. S. 476 (1957), this Court considered yet another form of utterance—obscenity—for the first time. Following *Beauharnais* despite vigorous arguments to the contrary,⁹ the Court transformed the dicta

⁶ *Beauharnais v. Illinois*, 343 U. S. 250 (1952). See dissenting opinions of Black, *J.* at 267, Reed, *J.* at 277, Douglas, *J.* at 284 and Jackson, *J.* at 287.

⁷ That Justice Frankfurter’s assessment of the number of those who would precisely so contend is, to say the least, conservative. See, e.g., *United States v. Roth*, 237 F. 2d 796, 801 (2d Cir. 1956) (Frank, *J.* concurring); *Roth v. United States*, 354 U. S. 476, 508 (1957) (Douglas, *J.* and Black, *J.* dissenting); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949); and see Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* *The Supreme Court Review* 191, 214 (1964).

⁸ *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1952).

⁹ “It is strenuously urged that these obscenity statutes offend the constitutional guarantees because they punish incitation to impure sexual thoughts, not shown to be related to any overt anti-social conduct which is or may be incited in the persons stimulated

in that decision into a square holding: that obscene utterances are not within the ambit of First Amendment protections and may be constitutionally suppressed in complete disregard of clear and present danger standards.¹⁰

In thus emancipating itself, so far as obscene publications are concerned, from the First Amendment requirement that a clear and present danger of overt anti-social conduct must be demonstrated before utterances may be suppressed, this Court has necessarily taken upon itself the task of determining whether utterances may be constitutionally suppressed solely by the technique of cataloguing and labeling them, rather than by analyzing the nature of the particular words sought to be suppressed and the circumstances under which they are uttered to determine the precise point at which such expression must give way to the overriding requirements of society.

As a consequence, the factual separation of obscene utterances, which may be suppressed, from protected

to such thoughts . . . It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois*. . . ." *Roth v. United States*, 354 U. S. 476, 485-86 (1957).

¹⁰ Even if it is conceded *arguendo* that *Beauharnais* was rightly decided, a substantial argument can be made that the transfer of the "unprotected speech" doctrine from libel to obscenity is unwarranted because by definition libel requires *proof of harm to another* as an essential element, see 53 C. J. S. §4, *Libel and Slander*, while no such proof can be mustered with respect to obscene material. See also *Beauharnais v. Illinois*, 343 U. S. 250, 256 (1952) in which the Court found that group libel posed a threat of violence.

speech, which may not,¹¹ has necessarily occupied a substantial portion of this Court's attention since *Roth*.¹²

¹¹ In the area of obscenity, the determination that a publication is protected speech is, in most instances and for all practical purposes, dispositive of the question of whether it may be constitutionally suppressed. For it has not yet been demonstrated, to satisfy the clear and present danger standard, that pornography bears any causative relation whatever to overt anti-social conduct which society may legitimately prevent. See Judge Frank's collection of studies of the behavioral sciences in *United States v. Roth*, 237 F. 2d 796, 812 (2d Cir. 1956); Lockhart & McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938); Jahoda and staff of Research Center for Human Relations, New York University, *The Impact of Literature, A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954); Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (1962); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949); The Institute for Sex Research, Inc., *Sex Offenders* (1965) pp. 126-127, 669-692; and see Murphy, *The Value of Pornography*, 10 Wayne L. Rev. 655 (1964).

¹² *Times Film Corp. v. City of Chicago*, 355 U. S. 35, reversing 244 F. 2d 432 (7th Cir. 1957) (the movie, "The Game of Love," held: not obscene); *Mounce v. United States*, 355 U. S. 180, reversing 247 F. 2d 148 (9th Cir. 1957) (an imported collection of nudist and art student publications containing many nude photographs, held: not obscene); *One, Inc. v. Olesen*, 355 U. S. 371 (1958), reversing 241 F. 2d 772 (9th Cir. 1957) ("One—The Homosexual Magazine," held: not obscene); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957) ("Sunshine & Health" and "Sun Magazine," held: not obscene); cf. *Kingsley-Int'l Pictures Corp. v. Regents*, 360 U. S. 684 (1959) (the French motion picture, "Lady Chatterley's Lover," held: the statute under which conviction for exhibition of the film had been obtained violated the First Amendment's guarantee of freedom to advocate ideas); *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962) (homosexual magazines with photographs of nude or near nude male models, held: not obscene); *Jacobellis v. Ohio*, 378 U. S. 184 (1964) (French motion picture, "The Lovers" held: not obscene); see also *Grove Press, Inc. v. Gerstein*, 378 U. S. 577 (1964); *Tralins v. Gerstein*, 378 U. S. 576 (1964); *Trans-Lux Distrib. Corp. v. Board of Regents*, 85 Sup. Ct. 952 (1964).

Recognizing that "a dim and uncertain line"¹³ separates obscenity from protected speech, this Court has been faced with the problem of how such fine distinctions, fraught with First Amendment implications, can be made.

A primary problem has been determining who may properly decide such matters. A number of negative answers have emerged from the decided cases.

Neither a police officer,¹⁴ an administrative board,¹⁵ the postal authorities,¹⁶ the booksellers,¹⁷ a police board of censors,¹⁸ a judge without a full hearing,¹⁹ a judge sitting without a jury *after* a full hearing,²⁰ nor even a jury²¹ may be the final arbiter of this ultimate issue.

Nor have the various courts of appellate review distinguished themselves for their ability to divine this Court's intentions on the matter.²²

¹³ *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205, 210 (1964). And see *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66 (1963).

¹⁴ *Marcus v. Search Warrant*, 367 U. S. 717 (1961).

¹⁵ *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963).

¹⁶ *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962).

¹⁷ *Smith v. California*, 361 U. S. 147 (1959).

¹⁸ *Times Film Corp. v. City of Chicago*, 365 U. S. 43 (1961).

¹⁹ *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964).

²⁰ *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448 (1957).

²¹ *Jacobellis v. Ohio*, 378 U. S. 184, fn. 6 (1964).

²² Cf. *State v. Jacobellis*, 115 Ohio App. 226, 230, 175 N. E. 2d 123, 125 (1961): "... the motion picture film in issue is obscene, lewd and lascivious within the definition . . . set forth in *Roth v. United States* . . ."; *State v. Jacobellis*, 173 Ohio St. 22, 28, 179 N. E. 2d 777, 781 (1962) (Ohio Supreme Court found the film depicted episodes "of complete revulsion during the showing of an act of perverted obscenity" and was worse than hard-core

This Court has consequently been required to sift the facts in each case in order to determine the constitutional implications of suppressing the publications and motion pictures brought to its attention. Given the law of obscenity in its present posture, there can be no quarrel with this assumption of judicial responsibility; but, unfortunately, since it assumed this role in *Roth v. United States*, this Court has been unable to obtain a consensus among its members nor articulate sufficiently detailed working principles for the classification of utterances which *Roth* compels²³ to guide the state and federal courts and legislatures upon whose performance the preservation of freedom of speech must ultimately depend.

Amici contend that a constitutional principle which requires a fine factual discrimination to be made by qualified persons who cannot be found, according to standards which cannot be articulated, is, in fact, not a rule of law at all,

pornography). But see *Jacobellis v. Ohio*, 378 U. S. 184 (1964) (film held not obscene). See also *Times Film Corp. v. City of Chicago*, 355 U. S. 35, reversing 244 F. 2d 432 (7th Cir. 1957); *Mounce v. United States*, 355 U. S. 180, reversing 247 F. 2d 148 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957).

²³ Cf. *Jacobellis v. Ohio*, 378 U. S. 184, 200 (1964) (Warren, C.J., dissenting): "... most of our decisions since *Roth* have been given without opinion and have thus failed to furnish . . . guidance [to the lower courts and legislatures]. Nor does the Court in the instant case . . . shed any greater light on the problem." And see Stewart, J., concurring in *Jacobellis*: "I shall not today attempt . . . to define the kinds of material [which may be suppressed]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that." (Emphasis supplied.) 378 U. S. 184, 197 (1964). Cf. *Haldeman v. United States*, 340 F. 2d 59, 62 fn. 6 (10th Cir. 1965): "The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters."

but rather, a license to adjudicate by whim and caprice.²⁴ Such a constitutional scheme is particularly dangerous in the sensitive area of First Amendment freedoms which "need breathing space to survive" and in which "government may regulate . . . only with *narrow specificity*."²⁵ (Emphasis supplied.)

But there is another, more substantive reason for reconsidering the *Roth* holding that obscenity is not protected speech and returning to the First Amendment philosophy by whose standards other forms of speech are measured. It lies in the historical and cultural and philosophic origins of our concern for preserving a free society and the integrity of thought and utterance of each of its members.

One of the principal architects of First Amendment philosophy, John Stuart Mill, in his *Essay on Liberty*, stated his conception of the proper relationship between man and society as follows:

" . . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even

²⁴ "In truth the matter in the last analysis depends upon how particular challenged material happens to strike the minds of jurors and judges and ultimately those of a majority of the members of this Court." *Jacobellis v. United States*, 378 U. S. 184, 204 (1964) (Harlan, J., dissenting).

²⁵ *N. A. A. C. P. v. Button*, 371 U. S. 415, 433 (1963).

right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else.

* * * Over himself, over his own body and mind, the individual is sovereign.

* * * *

"* * * No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.

* * * *

"* * * [W]ith regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom." (Emphasis added.)

This philosophy—that a man's mind and thoughts are his own, and that he may express his opinions without societal restraint on any subject, whether or not these thoughts appear to have any social value to the rest of the citizenry, until it can be demonstrated that his utterances will necessarily harm another—has been compressed into what is called the "clear and present danger" standard. Not a mere slogan, its central meaning was laid bare by

Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 376-77 (1927):

"To justify suppression of free speech *there must be reasonable ground to fear that serious evil will result if free speech is practiced*. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

* * * * *

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*" (Emphasis supplied.)

The distinction between speech which stirs the minds of men and speech which induces anti-social conduct or, to put it another way, between utterances which affect *thoughts* and those which incite to *action*, capsulized in the clear and present danger formula, has traditionally been of overriding importance in determining when the state may properly suppress speech. "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded

with illegal *action* as to be an inseparable part of it.”²⁶ (Emphasis supplied.)

This insistence upon a showing of the most urgent necessity before curbing expression is an attitude which pervades the decided cases of this Court, both before and since *Roth*.²⁷ This standard has been consistently applied to all kinds of utterances, even though they may be foolish, stupid, tasteless, or pure rubbish—except in one sphere: publications on the subject of sex which are labeled “obscene.” Expression which urges the overthrow of the government,²⁸ utterances which urge economic pressure against employers,²⁹ publications which libel public officials,³⁰ sym-

²⁶ *Roth v. United States*, 354 U. S. 476, 514 (1957) (dissenting opinion). See also Douglas, J., dissenting in *Beauharnais v. Illinois*, 343 U. S. 250, 284 (1952):

“My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.”

See also dissenting opinions of Reed, J., Black, J. and Jackson, J. in *Beauharnais*.

²⁷ Early cases which applied stringent clear and present danger standards to the suppression of speech or press, such as *Schenck v. United States*, 249 U. S. 47, 52 (1919), *Thornhill v. Alabama*, 310 U. S. 88, 104-105 (1940), *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940), *Thomas v. Collins*, 323 U. S. 516, 536 (1945), *Pennkamp v. Florida*, 328 U. S. 331 (1946) and *Terminiello v. Chicago*, 337 U. S. 1, 4-5 (1949) may appear to have been modified by the “gravity of the ‘evil’ discounted by its improbability” test applied in *Dennis v. United States*, 341 U. S. 494, 510 (1951); but compare *Yates v. United States*, 354 U. S. 298 (1957). Later decisions of this Court indicate that the *Dennis* test is limited to its peculiar facts. See *Edwards v. South Carolina*, 372 U. S. 229, 237-238 (1963), *Wood v. Georgia*, 370 U. S. 375, 385 (1962), *New York Times v. Sullivan*, 376 U. S. 254 (1964) and *Garrison v. Louisiana*, 379 U. S. 64 (1964).

²⁸ *Herndon v. Lowry*, 301 U. S. 254 (1937).

²⁹ *Thornhill v. Alabama*, 310 U. S. 88 (1940).

³⁰ *New York Times v. Sullivan*, 376 U. S. 254 (1964).

bols said to foster class antagonism,³¹ vituperative speech which charges racial and political groups with shocking offenses in a highly charged atmosphere³²—in all of these cases the First Amendment has been quite properly interposed between government and the speaker to protect the utterance.

But publications on “sexy” subjects receive unique treatment,³³ not because such matter constitutes a *threat* to society, but because it is “utterly without redeeming social importance,”³⁴ or, to state the proposition differently, “obscenity . . . is forbidden, in large part, not because it incites but because it offends.”³⁵

Amici submit that offense to the sensibilities of the audience is no proper ground for suppressing any speech. As long as the audience chooses voluntarily to submit to the offensive material, government may not intervene. See *Public Utilities Commission v. Pollack*, 343 U. S. 451, 468-469 (1952).

We are at one with Mr. Justice Douglas, dissenting in *Roth*, when he said:

“I would give the broad sweep of the First Amendment full support. I have the same confidence in the

³¹ *Stromberg v. California*, 283 U. S. 359 (1931).

³² *Terminiello v. Chicago*, 337 U. S. 1 (1949).

³³ *Roth v. United States*, 354 U. S. 476 (1957).

³⁴ *Id.* at 484. See discussion of the futility of dealing with this concept, *infra*, pp. 20-38.

³⁵ Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Columbia L. Rev. 391, 393 (1963).

ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.”³⁶

* * * * *

It may well be that a means of deliverance from this constitutional impasse is at hand.

When this Court decided *New York Times v. Sullivan*,³⁷ “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”³⁸ it gave the First Amendment new perspective, and for the first time since the unfortunate language in *Chaplinsky v. New Hampshire*³⁹ was followed in *Beauharnais v. Illinois*⁴⁰ and *Roth v. United States*,⁴¹ replaced within the protections of the First Amendment a segment of speech which had previously been removed.⁴² Whether this holding marks the beginning of a new direction for the Court in this sphere is too early to

³⁶ *Id.* at 514.

³⁷ 376 U. S. 254 (1964).

³⁸ *Id.* at 270.

³⁹ 315 U. S. 568, 571 (1942), quoted *supra*, p. 6.

⁴⁰ 343 U. S. 250 (1952).

⁴¹ 354 U. S. 476 (1957).

⁴² In *Beauharnais*, the Court found “libelous utterances not . . . within the area of constitutionally protected speech . . .” 343 U. S. 250, 266 (1952). *New York Times v. Sullivan* returned libel, at least against public officials, to the scope of First Amendment protections.

determine,⁴³ but some of Mr. Justice Brennan's language in his opinion for the Court⁴⁴ is pregnant with promise:⁴⁵

"In *Beauharnais v. Illinois*, . . . the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and 'liable to cause violence and disorder.' But the Court was careful to note that it 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel'. . . .

In deciding the questions [of constitutional limitations upon the power to award damages for libel of a public official] *we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels'.* . . .

Like 'insurrection', contempt, advocacy of unlawful acts, breach of the peace, *obscenity*, solicitation of legal business and the various other formulae for the repression of expression that have been challenged in this court, *libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.*" (Emphasis and bracketed material supplied.)

⁴³ See *Garrison v. Louisiana*, 379 U. S. 64 (1964) (concurring opinion): "*Beauharnais v. Illinois*, . . . a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the constitution is between 'speech' on the one side and conduct or overt acts on the other."

⁴⁴ The entire Court concurred in the result. Black, Douglas and Goldberg, *JJ.* concurred on still broader grounds.

⁴⁵ 376 U. S. 254, 268-269 (1964).

If *Beauharnais* has not been reversed so far as its peculiar facts are concerned, the above language suggests rather clearly that its rationale has been severely undercut and that this Court now regards all classifications of expression, even "obscene speech", to be within the ambit of First Amendment protections.

Furthermore it must be observed that the basic approach of *Beauharnais*, bottomed as it was upon the holding that "libelous utterances [are] not . . . within the area of constitutionally protected speech," has been explicitly rejected by the Court in *New York Times v. Sullivan*.

The questionable value of *Beauharnais* as precedent in its present posture is of particular relevance to the re-examination of the holding in *Roth* that obscene speech is not protected by the First Amendment, for the *Roth* opinion relies exclusively on *Beauharnais* for supportive precedent on that point.⁴⁶ That the decline and fall of *Beauharnais* as a precedent has left *Roth* like a structure without a foundation, cannot be denied.

Amici have attempted to demonstrate that *Roth v. United States* was decided in violation of fundamental First

⁴⁶ "It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois* . . .

'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'" (Emphasis supplied.) *Roth v. United States*, 354 U. S. 476, 485-486 (1957).

Amendment principle in the first place, that experience under the *Roth* rule has been futile, and that subsequent decisions in other First Amendment areas have exposed the *Roth* holding for the anachronism that it is.

As the Court observed in *Roth*:

"The door barring federal and state intrusion into [the area of fundamental freedoms of speech and press] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."⁴⁷

II.

The test of obscenity as announced in *Roth v. United States* and interpreted in subsequent decisions is vague and unworkable and inhibits the dissemination of expression which is not obscene and clearly within the protective scope of the First Amendment.

It has already been argued that the holding in *Roth v. United States*, 354 U. S. 476, 485 (1957) "that obscenity is not within the area of constitutionally protected speech or press" is a drastic curtailment of First Amendment protections.

We also urge that the standards expressed by the Court in *Roth* and interpreted in subsequent cases, for determining what forms of expression are "obscene" and therefore not entitled to constitutional protection should be re-examined because they are vague, unworkable and inhibit the dissemination of constitutionally protected expression.

⁴⁷ 354 U. S. 476, 488 (1957).

Obscenity, as defined in *Roth*, is "material which deals with sex in a manner appealing to prurient interest," or "material having a tendency to excite lustful thoughts." Obscenity is "utterly without redeeming social importance." 354 U. S. at 484. Furthermore, "the *Roth* standard [for holding material obscene] requires . . . a finding that the material 'goes substantially beyond customary limits of candor in description or representation of [sexual] matters,'" *Jacobellis v. Ohio*, 378 U. S. 184, 191 (1964), an element labeled "patent offensiveness." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 482 (1962). Rejecting the standard of *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360, in *Roth*, this Court substituted this test:

" * * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.

Thus the Court, having excepted "obscenity" from the protections of the First Amendment, was faced with the task of describing the limits of the exception with sufficient particularity to insure constitutional protection for other "non-obscene" forms of expression.

That it failed, in the view of *amici*, in *Roth* and in subsequent cases to delimit sufficiently precise boundaries for unprotected utterances demonstrates the difficulty of the assignment rather than the Court's failure to recognize the importance of its assigned task.⁴⁵ Although *Roth* liberalized the *Hicklin* test of obscenity by requiring con-

⁴⁵ "It is * * * vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U. S. at 488.

sideration of "the dominant theme of the material taken as a whole" and its effect upon "the average person" instead of judging the material "by the effect of an isolated excerpt upon particularly susceptible persons,"⁴⁹ and although many of the subsequent decisions of this Court following *Roth* have strictly limited obscenity convictions by the lower courts,⁵⁰ the test that *Roth* substituted has created as many problems as it has solved.

Mr. Chief Justice Warren⁵¹ and Justices Black,⁵² Douglas,⁵³ and Harlan,⁵⁴ have themselves raised serious questions as to the wisdom of the *Roth* test of obscenity.

Mr. Justice Douglas's critique of the *Roth* verbal formula in his dissenting opinion in *Roth*, in which Mr. Justice Black concurred, laid bare its inherent defectiveness as a constitutional standard:

"Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under the test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates

⁴⁹ *Roth v. United States*, 354 U. S. at 488-489.

⁵⁰ See cases collected in footnote 12, *supra*.

⁵¹ Concurring in the result in *Roth*, 354 U. S. at 494-495.

⁵² *Smith v. California*, 361 U. S. 147, 157 (1959) (concurring opinion).

⁵³ Dissenting in *Roth*, 354 U. S. at 512-514.

⁵⁴ Concurring in part and dissenting in part in *Roth*, 354 U. S. at 497-498.

a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.' * * * The test adopted here accentuates that trend.

* * * * *

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

* * * * *

"I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has 'no redeeming social importance.'

* * * * *

"For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless." 354 U. S. at 512, 513, 514.

Nor have the text-writers been silent in their criticism of the obscenity test formulated in *Roth*.⁵⁵

⁵⁵ E.g., Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960).

While *amici* have no quarrel with *Roth* insofar as it rejects the *Hicklin* rule of judging material by isolated passages and by its effect on particularly susceptible persons,⁵⁶ the test formulated in *Roth* presents a perplexing problem of application to those who would use the pronouncements of the Court for guidance in dealing with obscenity prosecutions.

FIRST: How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases?

SECOND: Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience?

THIRD: How is the determination that material is "utterly without redeeming social importance" to be made?

A. Obscenity Standards of Sex Portrayal.

Since obscenity as defined in *Roth* is "material which deals with sex in a manner appealing to prurient interest,"⁵⁷ it is necessary to inquire what, if any, constitutional meaning "prurient interest" has. Apparently the term was expropriated from a proposed draft of the Model Penal Code of the American Law Institute.⁵⁸ The Institute's definition of "prurient interest" is "shameful or morbid

⁵⁶ See Judge Learned Hand's critical analysis of the defective and now defunct *Hicklin* rule in *United States v. Kennerley*, 209 Fed. 119, 120-121 (D. S. D. N. Y., 1913).

⁵⁷ 354 U. S. at 487.

⁵⁸ A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) §207.10 (2): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest * * *."

interest in nudity, sex or excretion"⁵⁹ or "an *exacerbated, morbid, or perverted* interest growing out of the conflict between the universal sex drive of the individual and equally universal social controls of sexual activity."⁶⁰ (Emphasis supplied.) Are not these definitions descriptive of something other than normal sexual interest or arousal? Or did the Court intend some other meaning to be attached to the words "prurient interest"? If so, does the court equate "prurient interest" with normal sexual arousal? If not, what becomes of the "average person" whose sexual arousal determines whether or not utterances shall have constitutional protection? May an "average person" have an "exacerbated, morbid or perverted" sexual interest?

Nor is the recent pronouncement of members of this Court particularly illuminating in dealing with this problem. Although equating "prurient interest" with "impure desires relating to sex," Mr. Justice Harlan, speaking for himself and Mr. Justice Stewart, remarked:

" * * * one would not have to travel far even among the acknowledged masterpieces in any of these fields [literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962).

Moreover, since the Court in *Roth* defined obscenity not only as "material which deals with sex in a manner appealing to prurient interest" but, in the alternative, as "material having a tendency to excite lustful thoughts," a concept expressly rejected by the American Law Insti-

⁵⁹ *Ibid.*

⁶⁰ *Id.* at 29.

tute,⁶¹ it is not clear whether the Court intended to incorporate the Model Penal Code definition into its obscenity formula or whether, as Mr. Justice Harlan put it, the Court "merely assimilate[d] the various tests into one indiscriminate potpourri."⁶² These ambiguities provide ample cause for concern "[b]ecause First Amendment freedoms need breathing space to survive," and therefore, "government may regulate in the area only with *narrow specificity*."⁶³ (Emphasis supplied.)

The studies of the behavioral sciences in this area further illuminate the difficulties involved in ascertaining a constitutionally valid meaning for "prurient interest." It is an acknowledged fact that the studies have failed to reveal a direct causal relationship between exposure to obscenity and overt anti-social conduct,⁶⁴ without more. Of itself,

⁶¹ " * * * We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) §207.10(2). Comment, p. 10.

⁶² 354 U. S. at 500.

⁶³ *N. A. A. C. P. v. Button*, 371 U. S. 415, 433 (1964).

⁶⁴ See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S. v. Roth*, 237 F. 2d 793, 804 (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts*, 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S. v. Roth*, *supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 387 (1954); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949); The Institute for Sex Research, Inc., *Sex Offenders* (1965) pp. 126-127, 669-692; and see Murphy, *The Value of Pornography*, 10 Wayne L. Rev. 655 (1964).

"this absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control."⁶⁵

A recent study by Cairns, Paul and Wishner⁶⁶ reveals useful information of a more positive nature. Using sexual arousal as a physiological phenomenon more easily measured than "prurient interest," whatever the precise meaning of the latter term may be, the findings of the authors (two behavioral psychologists and a professor of law), after an examination of the psychological abstracts and a number of human experiments, are interesting and illuminating:

"1. A significant proportion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books.

2. Portrayals of female nudity and of sexual activity lead to sexual arousal in many males—adolescents as well as adults. These materials arouse females far less frequently.

3. Females, on the other hand, are more frequently sexually aroused than men by complex stimuli which portray 'romantic' or 'love' relationships and which constitute, in general, less direct sexual cues.

4. Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences among

⁶⁵ Douglas, J. dissenting in *Roth*, 354 U. S. 476, 511 (1957).

⁶⁶ Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (1962).

males for viewing sexually relevant materials include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.

5. The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal. It is not clear, however, whether the failure to observe evidence of sexual arousal is due to the fact that no arousal occurred or that the overt expression of the arousal was inhibited.

6. Exposure to certain types of sex stimuli is, for some persons, both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event." 46 Minn. L. Rev. at 1032.

These findings with respect to sexual arousal—which probably is a lesser physiological or emotional reaction than arousal of prurient interest—demonstrate on the basis of scientific evidence what those who have considered the social problem of obscenity for years have known that there are so many environmental and personality variables in the arousal of lustful thoughts or prurient interest that the determination of the precise books or pictures which are universally sexually stimulating is a metaphysical quest foredoomed to failure; what is sexually arousing to males holds no prurient interest to females; what excites lustful thoughts in females has no particular sexual effect upon males and is so widespread throughout our culture as to be impossible to eradicate by criminal prosecutions. Personality, maturity and intelligence differences and varying

quantities of guilt feelings about sexual matters cause vast differences in sexual response to the same stimuli even among males. What is sexually arousing to some is disgusting to others. The environmental factors under which sexual material is seen may cause significant differences in response in both males and females. As Judge Bok wisely observed more than a decade before this study:

"If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field * * * in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 137 (1949).

One more matter of concern with regard to the "prurient interest" and "lustful thoughts" language in *Roth*. Since obscenity is defined as "material that appeals to prurient interest" and equated with "material that has a tendency to excite lustful thoughts," what kind of a showing is necessary to establish that the material to be judged actually has the effect of arousal or excitement? Must a causal relationship be demonstrated between the publication and the pruriency, between the literature and the resultant lust, or will such "appeal" or "tendency to excite" be presumed? What standards are to be applied to determine the appeal and the tendency of the disputed material? Or is the inten-

tion of the creator of the book or picture controlling? What of the literary panderer whose intent is vile but whose book or picture fails to achieve his evil goal?

The cases since *Roth* have not answered these questions. They are, we suspect, unanswerable. Thus, the determination of what arouses "prurient interest" or excites "lustful thoughts"⁶⁷ is a vast guessing game, with the constitutional right of freedom of expression and the suppression of literature and art hanging in the balance.

B. The "Average Person."

While the substitution in *Roth* of "the average person" for "particularly susceptible persons" as the subject whose sexual arousal is the litmus of obscenity represents a logical liberalization of the *Hicklin* rule, this portion of the *Roth* obscenity test presents monumental problems as well.

Although it is now clear that neither what can safely be shown to children⁶⁸ nor to the emotionally unstable among us⁶⁹ provides an acceptable constitutional standard for censorship of obscenity, the positive determination of who is "the average person" to which *Roth* refers has few guidelines. He has been identified as the counterpart, in the law of obscenity, of the "reasonable man" in the law of torts.⁷⁰ But the delineation of the conduct of a "reasonable man" in negligence suits does not determine whether basic constitu-

⁶⁷ See *Winters v. New York*, 333 U. S. 507, 515-516, 520 (1948).

⁶⁸ *Butler v. Michigan*, 352 U. S. 380 (1957).

⁶⁹ *Roth v. U. S.*, 354 U. S. 476, 488-489.

⁷⁰ *U. S. v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S. D. N. Y. 1933), aff'd 72 F. 2d 705 (2d Cir. 1934). Cf. Judge Frank's critique of the "reasonable man" test in *U. S. v. Roth*, 237 F. 2d 796, 826-827 (2d Cir. 1956) (concurring opinion).

tional protections are to be granted or withheld, as in the area of obscenity censorship. And the analogy further breaks down when one considers that, since the vast majority of people neither know nor care about literary or artistic qualities,⁷¹ the standard of the composite fiction of "the average person" will include multitudes who were never intended to be the audience for the particular tract or motion picture in question and who, but for the publicity resulting from the obscenity prosecution, would never have experienced it. Moreover, one may well ask: Is the "average person" composite to be drawn from the 95% of the total male population who would be convicted if the sex laws now on the books were strictly enforced?⁷²

Is a tract designed for a special audience to be judged by the standard of "the average person" outside the group?⁷³

What of foreign movies imported to be shown in "art" motion picture houses? Is it the "average" art theater patron whose prurient interest is in issue in this context?

Moreover, if the test of obscenity is to turn upon the nature of the audience which is exposed to it, would it not be curious to find that the publicity surrounding an obscenity prosecution could, by calling the attention of the prurient-minded public to it, change the composition and size of the audience so as to render material obscene which at the outset of the prosecution clearly was not?

⁷¹ *Commonwealth v. Isenstadt*, 318 Mass. 543, 553, 62 N. E. 2d 840, 846 (1945).

⁷² Kinsey, *Sexual Behavior in the Human Male* (1948), at 217 et seq.; *Report of the Committee on Forensic Psychiatry*, Group for the Advancement of Psychiatry (No. 9, Rev. 1950); Kronhausen, *Pornography and the Law* (1959), at 155 et seq.

⁷³ Cf. *Manual Enterprises, Inc. et al. v. Day*, 370 U. S. 478, 82 S. Ct. 1432, 1434 (1962).

The concept of "the average person" disintegrates completely as a valid test when it is applied to what has been described as "hard core" pornography.⁷⁴ It has been widely noted that "hard core" pornography, far from having appeal to normal or "average" persons, is disgusting to them; it seems to appeal only to the sexually inadequate: "the frightened, the impotent, the bored and sated, the senile * * * the adolescent * * * not yet old enough to seek sexual partners or * * * [the person who] has lost the precious power of spontaneous sexual feeling."⁷⁵

Thus, even in a case dealing with "hard core" pornography, the "appeal to the average person's prurient interest" test is entirely useless because pornography is "appealing" only to the decidedly "non-average" individual and is repulsive to "the average person" in the standard.

C. Determining What Is "Utterly Without Redeeming Social Importance."

In *Roth* the Court described obscenity which was not constitutionally protected as "utterly without redeeming social importance." Thus, the Court has embarked upon the project of determining which books and pictures have any social importance, at least as to those which might otherwise be obscene. We suggest, as did Mill, that "the usefulness of an opinion is itself a matter of opinion; as disputable, as

⁷⁴ Brief for the United States, pp. 37-39 in *Roth v. U. S.*, *op. cit.*

⁷⁵ Margaret Mead, *Sex and Censorship in Contemporary Society*, New World Writings (Third Mentor Selection 1953) at pp. 18-19; and see D. H. Lawrence, *Pornography and Obscenity in Sex Literature and Censorship* 74-77 (1953): "[Pornographic books] are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."

open to discussion, and requiring discussion as much as the opinion itself."⁷⁶

Although the "social importance" standard was undoubtedly designed by this Court to protect expression which might otherwise be obscene, the judicial exploration of the social value of books or pictures as a factor in determining whether or not they should be suppressed is an imposing task which has dangerous implications to freedom of expression. As Mr. Justice Douglas has pointed out:

"The First Amendment * * * was designed to preclude courts as well as legislatures from weighing the values of speech against silence." *Roth v. U. S.*, 354 U. S. at 514 (dissent).

It seems curious, to say the least, that only in the area of sexual expression must a distributor of printed material affirmatively prove that the publication has social importance before he can demonstrate his right to disseminate it. In all other spheres of expression, First Amendment protections do not depend upon "the truth, popularity, or social utility" of the material sought to be suppressed,⁷⁷ for if all utterance were limited to wisdom, knowledge, truth, and social value many of us would be required to stand mute virtually all our lives.

The danger involved in determining which public utterances have "redeeming social importance" was well understood by John Stuart Mill.

"Mankind can hardly be too often reminded, that there was once a man named Socrates, between whom and

⁷⁶ John S. Mill, *Essay on Liberty*.

⁷⁷ *N. A. A. C. P. v. Button*, 371 U. S. 415, 445 (1963).

the legal authorities and public opinion of his time there took place a memorable collision. * * * This acknowledged master of all the eminent thinkers who have since lived—whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which make his native city illustrious—was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the gods recognised by the State; indeed his accuser asserted (see the 'Apologia') that he believed in no gods at all. Immorality, in being, by his doctrines and instructions, a 'corrupter of youth.' Of these charges the tribunal, there is every ground for believing, honestly found him guilty, and condemned the man who probably of all then born had deserved best of mankind to be put to death as a criminal."

* * * * *

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they

lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

" * * * We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."

John Stuart Mill, *Essay on Liberty*.

To illustrate, it may well be that, despite the Comstocks and the bluenoses, there is social value in the smuttiest literature, the most "hard core" of pornography, the most offensive of pictures. Our medical and behavioral scientists are beginning to discover that these materials act as releases of tension to the sexually frustrated, unhappy or abnormal unfortunates who might otherwise act out their sexual fears and hostilities in criminal conduct dangerous to themselves as well as to others.

Consider, for example, the comment of Dr. Benjamin Karpman, chief psychotherapist of St. Elizabeth Hospital, Washington, D. C., reported in Kronhausen, E. and P., *Pornography and the Law*, 273-274 (1959):

"Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interest they may have."

And see Murphy, *The Value of Pornography*, 10 Wayne L. Rev. 655, 660-661 (1964):

"With regard to the assumption that reading pornography leads directly to acts of violence and public offenses, evidence would seem to show that the indi-

vidual who collects pornography, who derives his primary sexual gratifications from the production, collection or perusal of pornography, and who is denominated for these reasons a pornographer, is a shy introvert. Quietly and privately, he takes his pleasure and obtains release from his tensions through study of pictures, films, books, cartoons, phonograph records, carvings or whatever represents or depicts for him a pornographically eroticizing experience. What excites him at this remove may be the description of conventional sexual conduct which is barred to him by impotency, physical handicap, fear or repugnance. What is depicted may be perverse sexual practices which he is too frightened or ashamed to participate in himself or to even directly view. One of the most outstanding attributes of the pornographer is his inhibition. It is not unreasonable to expect that when he is deprived or—what is more likely—is driven by conscience to deprive himself of this vicarious release, *tension might accumulate to a point of violence or public display. Hence it would seem that the opportunity to indulge in pornography could serve to prevent or postpone, rather than to stimulate, such outbreaks of violence by the pornographer.*" (Emphasis supplied.)

It is not here contended that pornography has great social value, or any. It is enough that the possibility of value exists to compel humility and superabundant caution among those who would suppress any form of expression. For after the book-burning⁷⁸ it is too late to re-evaluate the social value of the contents.

⁷⁸ This is not merely vivid language of *amici*. See *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964) (book-burning statute held unconstitutional).

Or, to say it another way in the language of the Court, the "redeeming social importance" justifying the dissemination of all forms of expression, if not found in the work itself, is found in the fabric of freedom woven by its uncensored use.

CONCLUSION

Amici have attempted to demonstrate some of the areas of obscurity and logical impasse which arise in specific applications of the rule in *Roth* as a result of the failure to apply the "clear and present danger" test in the obscenity area. We believe, as does Mr. Justice Harlan⁷⁹ that "it is no answer to say * * * that obscenity is not protected speech." Where matters of expression are involved, a failure to define precisely, accurately and with predictability the items which may be censored, cannot fail "to impose a severe limitation on the public's access to constitutionally protected matter,"⁸⁰ both by misinterpretation of the stated tests by the lower courts and by the extrajudicial pressures of threatened prosecutions,⁸¹ "under dangers which are hazarded only by heroes."⁸²

In the view of *amici*, the attempt in *Roth* to differentiate between utterances which are constitutionally protected and

⁷⁹ *Roth v. U. S.*, 354 U. S. at 507 (concurring in part and dissenting in part).

⁸⁰ *Smith v. California*, 361 U. S. 147, 153 (1959).

⁸¹ E.g., *New American Library v. Allen*, 114 F. Supp. 823 (N. D. Ohio 1953); *American Mercury, Inc. v. Chase*, 13 F. 2d 224, 225 (D. C. Cir. 1926); *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (1950).

⁸² *Dennis v. U. S.*, 341 U. S. 494, 550 (1951) (Frankfurter, J., concurring).

those which are not, has been unsuccessful because of vagueness, unworkability and, most important, the setting of standards to test expression which carry dangerous implications for the "fullest possible opportunity for the free play of the human mind."⁸³

It will be contended by those who would suppress all disagreeable or offensive art and literature that obscenity is a social problem which must be controlled, even at the expense of some unfortunate but necessary inroads upon free expression. But we think it more accurate to say that traffic in obscenity (which requires consumers as well as purveyors) is a symptom of a social problem rather than an evil *per se*. For that precise reason it is both ineffectual and dangerous to attempt to treat the problem solely by prosecutions, broad in scope, which ignore entirely the underlying cultural, social and personality factors which make autoerotic fantasy material attractive to large segments of the public.

As Mr. Justice Warren, concurring in the result in *Roth*, has cautioned:

"To recognize the existence of a [social] problem * * * does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments." 354 U. S. at 495.

⁸³ *Dennis v. U. S.*, *supra*, at 550 (Frankfurter, J., concurring).

Whatever legislatures and courts may seek to accomplish in this area, it must be borne in mind that:

"The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."⁸⁴

For all of the foregoing reasons, the convictions should be reversed.

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⁸⁴ *United States v. Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943) (Hand, L., J.).

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IN THE
Supreme Court of the United States

October Term, 1965
No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the

Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

Ralph Ginzburg, et al. v. United States of America is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On August 13, 1962, Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on August 14, 1962.

In letters dated September 4, 1962 and October 18, 1962, Eros Magazine, Inc. wrote the postmasters of Blue Ball, Pa., and Intercourse, Pa. as follows:

"After a great deal of deliberation we have decided that it might be advantageous for our direct mail to bear the postmark of your city."

The letters were on Eros Magazine, Inc. stationery and were signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. The postmaster of Intercourse, Pa., by letter dated September 8, 1962, replied that his post office was too small to handle bulk mailings.

Eros Magazine, Inc. of 110 West 40th St., New York, commenced mailings from Middlesex post office on October 7, 1962. Approximately 5,053,884 pieces of bulk mail advertisements for Eros Magazine had been mailed up to the date of trial, June 10, 1962, at a total cost of \$132,704.93.

On November 20, 1962, Documentary Books, Inc., requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on November 20, 1962. Thereafter 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were shipped from that post office.

First-class mailings of Liaison News Letter, Inc. were also mailed from the Middlesex post office.

An investigation was commenced within days after the first mailings of Eros at Middlesex, New Jersey.

Thereafter testimony was presented to a Federal Grand Jury sitting in the Eastern District of Pennsylvania, which on March 15, 1963, returned its true bill

of indictment charging petitioners in 28 counts with mailing obscene publications and advertisements for such publications, in violation of 18 U.S.C. 1461 [R. 1a, 6a-13a].

Petitioner Ralph Ginzburg was named in all 28 counts. One of the three corporate petitioners was also named with Ginzburg as a co-defendant in each of the 28 counts.

Petitioners Ralph Ginzburg and Documentary Books, Inc. were charged with three counts (Counts 1 through 3) of having caused the mailing of advertisements to two persons in Philadelphia and one person in Havertown, Pa., on November 15, November 17 and December 12, 1962, telling where an obscene book, "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony could be obtained. The same petitioners were also charged with six counts (Counts 11 through 16) of having caused the mailing of the same obscene book to six persons in Philadelphia, Pa.

The petitioners Ralph Ginzburg and Liaison News Letter, Ind. were charged with three counts (Counts 4 through 6) of having caused the mailing of advertisements on November 27, 1963 to three persons in New Hope, Pa., Havertown, Pa., and Paoli, Pa., telling where an obscene pamphlet, named "Liaison, Vol. 1, No. 1" could be obtained. The same petitioners were also charged with four counts (Counts 23 through 28) of having caused the mailing of the same obscene pamphlet, "Liaison, Vol. I, No. 1" to four persons in Philadelphia, Pa., one person in Jenkintown, Pa., and one person in Valley Forge, Pa.

Petitioners Ralph Ginzburg and Eros Magazine, Inc. were charged with four counts (Counts 7 through 10)

of having caused the mailing of advertisements on March 24, November 17, December 11, and December 18, 1962, to persons in Philadelphia, Pa., Rosemont, Pa., Chester, Pa., and Elkins Park, Pa., telling where an obscene book, named Eros, Vol. 1, No. 4, could be obtained. The same petitioners were also charged with six counts (Counts 17 through 22) of having caused the mailing of the same obscene book, Eros Vol. 1, No. 4, to five persons in Philadelphia, Pa., and one person in Gladwyne, Pa.

On April 11, 1963, petitioners filed a motion to dismiss the 18 counts of the 28-count indictment which pertained to "The Housewife's Handbook on Selective Promiscuity" and Liaison Vol. 1, No. 1 on the ground that such materials were not obscene within the meaning of 18 U.S.C. Section 1461 [R. 13a]. Copies of the book and pamphlet and advertisements referred to in the 18 counts were attached to the motion as exhibits. Annexed to the motion was an affidavit of petitioner Ralph Ginzburg [R. 14a-16a] saying that "prior hereto and in February 1962" he had written 1000 "prominent persons" asking their view on "The Housewife's Handbook" and annexing 69 replies thereto, together with a book review of the "Handbook" by William J. Bryan, Jr. M.D. appearing in the Journal of the American Institute of Hypnosis, January 1962 and a book review of the "Handbook" by Dr. Robert M. Frumkin, appearing in the Journal of Human Relations, Summer 1962, Vol. IX, page 513.

On May 8, 1963, petitioners acknowledged by stipulation that in all counts in which the three publications or the advertisements pertaining thereto were involved, they "did knowingly mail or cause to be mailed the materials set forth in those counts on the dates set forth,

fully knowing the contents of said materials." [R. 149a, 150a, 152a].

On May 17, 1963, the people's motion to strike the Ginzburg affidavit and its 69 annexed exhibits was granted. On May 23, 1963 petitioners' motion to dismiss the 18 counts of the 28-count indictment was denied [R. 151a].

On June 10, 1963, petitioners filed a waiver of trial by jury [R. 2a]. The case was tried to the court on June 10, 11, 12, 13 and 14, 1963, and the trial judge rendered his verdict on June 14, 1963.

During its case in chief, the United States of America called the postmasters of Middlesex, New Jersey, Blue Ball, Pa., and Intercourse, Pa., the postal inspector of Middlesex, New Jersey, and the editor of *Liaison* Vol. 1, No. 1. After introducing in evidence a copy of "The Housewife's Handbook on Selective Promiscuity," "Eros Vol. 1, No. 4" and "Liaison Vol. 1, No. 1," and the ten advertisements and their mailing envelopes, supporting Counts 1 through 10, the people rested.

In their defense, petitioners called seven witnesses: A clinical psychologist, an art critic, the author of "The Housewife's Handbook on Selective Promiscuity," a magazine editor, an attorney, a psychiatrist, and a Southern Baptist minister/family counselor. Eight books and pamphlets were introduced into evidence as examples of "hard-core pornography" and 34 magazines and paperback books were introduced into evidence as having been recently purchased in shops in New York City and Philadelphia, Pa.

In rebuttal the United States Government called three witnesses: two psychiatrists (one male and one female), and a Baptist minister/family counselor.

United States of America: Case in Chief.

Arthur J. Rodgers, Jr., the Postmaster of Blue Ball, Pa. testified as follows: In the course of his business as postmaster he had received a letter on the stationery of Eros Magazine, Inc. dated October 18, 1962, and signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg, reading in part, "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." [R. 152a-155a, Ex. G-1]. The postmaster's reply was not offered in evidence, nor was there evidence presented of any mailings from the Blue Ball post office.

Miss Bertha M. Martin, the postmaster of Intercourse, Pa., testified as follows: In the course of her business as postmaster, she had received a similar letter on the stationery of Eros Magazine, Inc., dated September 4, 1962, and signed by Frank R. Brady, reading in part: "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." She informed the originator by letter that, because of limited facilities, the Intercourse post office would not be able to handle bulk mailings in such a volume [R. 156a-159a].

Robert W. Sanders, the postmaster of Middlesex, New Jersey, testified as follows: On August 13, 1962, petitioner Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage, through General Mailing Corporation, a mail-order house patron of Middlesex post office. Permit No. 8 was issued on the following day. Substantial bulk mailings commenced on October 7, 1962 and continued to the present time (June 10, 1963). Approximately 5,053,884 pieces of third-class bulk mail contain-

ing advertisements for Eros Magazine went out, at a mailing cost of \$132,704.93. The total pieces of all classes of mail was 6,067,573 and the cost of mailing was \$163,438.48.

On November 20, 1962, petitioner Documentary Books, Inc. requested an application to mail without affixed postage, through the same mail-order house patron of Middlesex post office and Permit No. 8 was issued by his post office (Middlesex) on the same date. A total of 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were received for mailing.

Liaison News Letter, Inc. also mailed first-class mailings through his post office (Middlesex).

J. Shane Creamer, the Assistant United States Attorney, placed in evidence the ten advertisements and mailing envelopes which were received through the mail, which were the basis for the first ten counts of the indictment. The exhibits were the subject of a stipulation previously filed with the Court on May 8, 1963, in which the petitioners acknowledged that they did "knowingly mail or cause to be mailed" the same "on the dates set forth, fully knowing the contents of said materials." [R. 165a, 149a, 150a, 152a].

Hugh J. McDermott, a postal inspector of Middlesex post office testified that he began investigating the case as to a violation of the postal obscenity statutes within days after the first mailings of Eros at the Middlesex post office [R. 172a].

John Willis Darr, the editor of "Liaison Vol. 1, No. 1," the pamphlet named in the indictments, testified that he had been a writer for twelve years and as such had been referred to the Eros offices in September or Oc-

tober of 1962, by an employment agency [R. 173a]. After an interview with Warren Boroson, he received a post card from Mr. Ginzburg inviting him to submit samples of his past work which he did. Within a week of the time that he was referred by the employment agency, he was interviewed by Mr. Ginzburg, who told him he was looking for an editor and writer for *Liaison*. "*Liaison*" was to cover the same scope as "*Eros*," but in a more newsworthy fashion [R. 174a]. Following this interview and at Ginzburg's request, he submitted an article called "How to Run a Successful Orgy" to their offices, which later appeared in *Liaison News Letter* in a revised form [R. 175a]. Later Ginzburg telephoned him and said, "When can you start to work?" [R. 177a]. He was hired at a salary of \$7500 a year [R. 181a].

As editor of "*Liaison*" he inherited a collection of magazines, newspapers, clippings and notes which he used as research material and background for the newsletter [R. 177a]. He identified, as having been written by him, the statement of policy, appearing on page 1, the article, "Semen in the Diet," appearing on pages 4 and 5 and the article, "Sing a Song of Sex Life," appearing on pages 5 and 6 of "*Liaison Vol. 1, No. 1*" [R. 179a, 181a]. All of the copy for the newsletter was placed in a basket on the desk of the front office and from there it was transported up to Ginzburg's office upstairs. As a rule he would get the material back on his desk the next day.

Ginzburg gave him instructions that the last page should not contain any four-letter words. The newsletter was folded for mailing in such a manner that two-thirds of the last page was exposed to those handling

the mails [R. 179a]. As to the statement of policy, Ginzburg might have said, "It is all right" or "It is good" or something like that [R. 179a]. He had a discussion with Ginzburg about his reaction to the article, "Sing a Song of Sex Life." They discussed the line "The professors have crawled out of the dust and discovered lust" and he thought Ginzburg liked that line [R. 181a].

At the time of his termination of employment in November of 1962, he had completed five issues of "Liaison" and two had been published [R. 183a].

The Assistant United States Attorney placed in evidence a copy of "Liaison Vol. 1, No. 1" [Ex. G-16, R. 178a]. "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony [Ex. G-17, R. 184a] and "Eros, Winter, 1962, Vol. 1, No. 4" [Ex. G-18, R. 185a] and rested the Government's case in chief.

Petitioners' motion for dismissal of the indictment on the ground that the Government had failed to make out a case under 18 U.S.C. Section 1461 was denied.

Ralph Ginzburg et al.'s Defense.

Dr. Charles G. McCormick, a clinical psychologist, testified that pornographic material could be described in psychological terms and gave his opinion as to what he, as a psychologist, considered to be pornography [R. 188a]. In his opinion pornographic material must "combine both the sense of pleasure and the sense of guilt or shame" in the individual [R. 188a] and that the sense of guilt or shame was a "sense of being able to engage in something that is intrinsically bad to the reader based upon whatever he had accumulated from

the air in which he grew up. . . ." [R. 189a]. He thought that most pornographic materials "are published secretly . . . without acknowledgement . . . won't even carry a title page on which the author's name is given or the publisher's name is given. There is no date . . . no commitment for responsibility behind it." And that these surreptitious factors gave the person who would read them the impression that sexual expression was evil, sex was shameful and that what the material was about was a shameful item [R. 191a]. In his opinion one of the essential building blocks of pornographic material was the distortion of reality, such as the reaction of the pre-adolescent girl to her violation in "the autobiography of the flea." Such distortion was necessary "to bring his readers' attention exclusively on attempting to absorb the guilty pleasure from the material itself." "... there would have to be something wrong with the person for" the pornographic material he referred to not to act as a sexual stimulant and produce sexual stimuli. "... he would have to be ill in some way, physically or psychologically." [R. 193a].

In his opinion, while under certain circumstances, the view of an attractive nude woman could erotically stimulate an average male and such erotic response would be felt and experienced by the individual exactly the same as for pornographic material [R. 194a], the stimuli of shame which accompanied pornography would not be produced in the viewer nor would he have an itching or a morbid or a licentious sexual arousal unless the person were pathological [R. 195a] or "the publication were designed to do this, but under ordinary circumstances where the publication were a responsible one, there would be no reason to expect this to be so."

In his opinion, a person would have to be extremely exhibitionistic (pathological) not to feel uncomfortable about having his neighbor see him reading the material which he considered as pornographic.

"... in presenting the examples of the type of material which Dr. McCormick has testified to..." [R. 201a] Sidney Dickstein, the defense counsel, placed in evidence eight books and pamphlets: "A Small Pig" booklet [Ex. D-1], a pamphlet, "John Dillinger in a Hasty Exit" [Ex. D-2], a pamphlet, "Mr. Bregar is Sold on TV" [Ex. D-3], a booklet, "Dagwood Has a Family Party Let's Go" [Ex. D-4], a pamphlet, "Secrets Will Out" [Ex. D-5], a book, "The Oxford Professor" [Ex. D-6], a book, "The Autobiography of a Flea" [Ex. D-7], and a book, "Devil's Advocate" [Ex. D-8]. Dr. McCormick testified that the effect of such materials on the average person would "be one of revolution, and one of being assaulted." "In other words, it is actually destructive for the individual, the ordinary individual to read that kind of material because he doesn't have the emotional base and he doesn't have the capacity for keeping context..."

Dr. McCormick testified that he had read "Lady Chatterley's Lover." It was his opinion that while Exhibits D-1 through D-8 and "Lady Chatterley's Lover" were all sexually stimulating, the impact on the system of the ordinary individual was radically different. He said "There is context. The reality setting, the reality factors, the complications, the responsibilities of the author, the attitude of the author as he presents the material..." [R. 203a]. In "Lady Chatterley's Lover" there "is a responsibility in the sense that the actual presentation by the author gives you reality situations rather well..." [R. 204a].

Dr. McCormick testified that he was acquainted with "Lolita" by Nabakov. It was his opinion that the subject matter and themes of "Oxford Professor" (one incident of which involved the seduction of an immature girl) and "Autobiography of the Flea" and "Lolita" (the story of the seduction of a pre-adolescent by an established psychotic individual) were identical, but the books were "different" in the way in which they dealt with the similar subject matter. The difference was reality. "Lolita" was psychologically sound. The author makes the reader appreciate the fact that "this is one individual's distortion, but a reality of distortion" [R. 205a].

Dr. McCormick testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion the predominant effect of this material was not to create in an average person an itching, morbid or shameful desire or longing with respect to sex [R. 206a]. In his opinion the book was not morbid, nor did it tend to corrode and turn the reader against himself in the process of reading [R. 210a], as was the case with pornographic material. It gave a realistic picture of a woman's attitude and activities with respect to sex [R. 210a]. It would not produce a guilty feeling in the individual because it was supported by a responsible attitude on the part of the author. A reader will feel informed rather than guilty after having read it [R. 211a].

Dr. McCormick had read "Eros Vol. 1, No. 4" and was of the opinion that the predominant effect would not create in the average person an itching or morbid or shameful desire or longing with respect to sex. He thought that there were a couple of passages in Eros

that would be erotically stimulating to an average person reading it, such as in the article by Frank Harris [R. 212a] and the article by the Kronhausens [R. 213a] and that they would not stimulate in the average person a morbid or unhealthy attitude toward sex, because of the reality context that the author, who is quoted, maintains. "While erotically stimulating, it is not pathological" [R. 214a].

Dr. McCormick had read "Liaison Vol. 1, No. 1" and was of the opinion that the predominant effect of it would not create in the average person an itching, morbid or shameful desire or longing with respect to sex, nor would it be erotically stimulating [R. 215a]. He was of the opinion that one who was already perverted (a paraphiliac) would be sexually stimulated because of psychic distortions [R. 215a]. While both the article by Dr. Albert Ellis and the article "Semen in the Diet" had the tone of an assault on the reader, neither one would have any erotic effect because they lacked any established association with the reader [R. 216a].

Dr. McCormick was of the opinion "The Housewife's Handbook" would be quite useful as an educational instrument [R. 216a]. It gave a realistic portrayal of the evolution of sexual awareness and sexual expression of "an ordinary everyday person with the natural emotional and intellectual limitations who had to grope . . . through just like everyone else has to grope his way through toward some kind of sexual adjustment. . . ." He considered it a valuable instrument for a person who was looking for sexual education. He thought the book would be useful under supervision. The restriction was imposed for the purpose of guiding the person in making distinctions "where the layman in reading it

would not be able to distinguish those aspects that were the individual's own problems and those aspects of the material that were a natural universal problem of getting educated." [R. 217a].

The Assistant United States Attorney did not cross-examine Dr. McCormick.

Horst W. Janson, an art critic, testified as to the origin of the etchings, engravings and woodcuts appearing in "Eros Vol. 1, No. 4" at pages 2, 6, 7, 8, 9, 10, 11, 12, 13 and 81 [R. 219a-220a]. He thought the photographs on page 73 *et seq.* in the essay entitled "Black and White in Color" were "outstanding, beautifully and artistic photographs." The photographer had an "extraordinary sense of form and composition" [R. 221a]. He saw the "symbolic expression of blending together of the equivalence of the two people represented," so familiar in certain British postage stamps, used as an artistic compositional device, in the first photograph depicting the Caucasian female's facial profile superimposed on the Negro male's profile, in the full page photograph of the two eyes, and in the final full page photograph depicting the full length nude Negro male and nude Caucasian female in an amorous embrace. He was of the opinion that in terms of material and graphic layout and taste displayed in presenting the material, Eros was the equal of any magazine being published today [R. 222a].

The Assistant United States Attorney did not cross-examine Mr. Janson.

Lillian Maxine Serett, the author of "The Housewife's Handbook on Selective Promiscuity," testified that she started writing the book 15 years ago and finished it three years ago. She had gone into the printing

business two years prior to finishing the book and had printed it herself under the title "The Housewife's Handbook for Promiscuity" and the printing label, Seymour Press [R. 223a]. The edition published by Documentary Books, Inc. had the same textual matter as her edition [R. 224a] which she originally published in August and September of 1960. A reprint with an introduction by Dr. Ellis was mailed out to doctors, psychologists, and college professors who were heads of psychology departments. Approximately 400,000 brochures were mailed since October, 1960 and a little over 12,000 copies had been sold [R. 225a].

She stated that the Kinsey Reports confirmed her belief that woman's role in sex was widely misunderstood and that she hoped her book, written in a layman's language, could communicate to women that the sexual activities and attitudes they have are not unusual or unique, that various forms of sexual expression are normal and healthy things to do and that women do have sexual rights [R. 226a].

The Assistant United States Attorney did not cross-examine Mrs. Serett.

Dwight MacDonald, a magazine editor and literary film critic, testified that he reads about 200 books a year or about five a week. He had seen a change or movement in the permissible limits of sexual candor in our literature, especially in the last five or six years [R. 230a]. That "Fanny Hill," which had always been regarded as "hardcore pornography" should be published was extremely significant in his judgment, as was the publication of "Tropic of Cancer" and "Naked Lunch," "which is an extremely, really a sick book" [R. 231a].

He recalled that six or seven years ago the models in girlie magazines had to wear brassieres, whereas now they can expose their bosoms, although "they can't be actually nude from the front anyway, but that will perhaps come." In the movie industry of the 20's, one could not show two people living together who were not married, nor could they show a husband and wife in a single bed [R. 234a]. Now it was possible to show rape, prostitution, and explicit scenes of sexual intercourse [R. 235a].

Dwight MacDonald testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion, "Speaking as a long-time student of mass culture in American society" he would say that it did not go substantially beyond the customary limits of candor that American society permits in its literature at this time." He thought that it was not a particularly interesting book, that it had no literary value, and that its only importance would be as case history for doctors. In comparing it with "Lady Chatterley's Lover," he thought the latter a work of literary art, whereas "The Housewife's Handbook" was not [R. 236a].

He was of the opinion that "Liaison Vol. 1. No. 1" was "an extremely tasteless, vulgar and repulsive issue" but that it did not go substantially beyond the customary limits of candor we tolerate in discussion of sexual matters and that he did not think it obscene or pornographic [R. 237a].

He was of the opinion that "Eros Vol. 1. No. 4" did not go substantially beyond the customary limits of candor which we in this country now tolerate and accept [R. 238a]. He was of the opinion that the following articles had significance or note for some literary merit: "Love in the Bible," "Jewel Box Review," "Let-

ters from Allen Ginsberg," "Was Shakespeare a Homo?" "New Twists on Three Great Trysts," "The Natural Superiority of Women as Erotisists," "Black and White in Color," and "Lysistrata." [R. 239a]. He thought there were a considerable number of articles that had either trivial or poor literary merit and at least one, "Bawdy Limericks," had no merit and was quite vulgar. Nevertheless, he did not think them obscene or pornographic [R. 240a].

The Assistant United States Attorney did not cross-examine Mr. MacDonald.

Sidney Dickstein, the defense counsel, placed in evidence a copy of "Memoirs of a Woman of Pleasure" by John Cleland [Ex. G-9] as having been discussed by Dwight MacDonald.

Arthur J. Galligan, the law partner of the defense counsel, testified that he had visited several stores in New York City in the vicinity of 6th and 42nd Street and in Philadelphia, Pa., in the vicinity of 15th and Market and had made numerous purchases of paperback books, girlie and nudist magazines. The following of his purchases were placed in evidence as Exhibits D-10 through D-43* [R. 243a-256a]:

D-10 Waterfront Blonde

D-11 Rogue Magazine

D-12 Gang Girl

*Gang Girl and Wild Body held obscene in *Chi. v. Wood*, 63 M.C. 156720; Nymph #4 held obscene in *Chi. v. Charles Kimmel*, 63 M.C. 190116; Pastime, Vol. 2, No. 4, held obscene in *Chi. v. Westbery*, 63 M.C. 104281; Adam, Vol. 7, No. 6, held obscene in *Chi. v. Soden*, 63 M.C. 155883; Escapade, April 1964, held obscene in *Chi. v. Dahlia*, 64 M.C. 127005; Snap, Vol. 4, No. 2, and Tip Top, Vol. 3, No. 6, were subjects of federal obscenity indictments in *United States v. Milton Lueros et al.* (trial date Oct. 18, 1965); Gymnos, Oct. 1963, held obscene in *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); see also other paper-

- D-13 The Sucker
- D-14 Pushover
- D-15 Rock-N-Roll Gal
- D-16 They Couldn't Say No
- D-17 Wild Body
- D 18 Nymph Issue No. 5
- D-19 Tic Toc Vol. 1 No. 2
- D-20 Pastime Vol. 2 No. 5
- D-21 Adam Vol. 7 No. 6
- D-22 Satan's Scrapbook Vol. 1 No. 1
- D-23 Kiss No. 2
- D-24 Stark Vol. 1 No. 1
- D-25 French Frills Vol. 2 No. 5
- D-26 Hip and Toe Vol. 1 No. 2
- D-27 Vue, July Issue
- D-28 Photo Button, Series 7
- D-29 Treasure Box Review, Series 18
- D-30 Treasure Box Review, Series 19
- D-31 Tip Top Vol. 2 No. 6
- D 32 Snap Vol. 3 No. 2
- D-33 Twilight No. 3
- D-34 Zoftick Vol. 2 No. 1
- D-34 Ruby Vol. 1 No. 1
- D-36 Torch Vol. 2 No. 1
- D-37 Nude Word Issue No. 6
- D-38 Gymnos July 1963
- D-39 The Wrong Turn, and Season of Love
- D-40 Escapade, August Issue
- D-41 Cavalcade, August 1963
- D-42 Scamp, September
- D-43 M R Spring 1962

back books, girlie magazines and nudist magazines which have run afoul of the law as tabulated in CDL Commentaries, Vol. 1, No. 2 (Nov. 1965). This problem of comparables is analyzed in *United States v. West Coast News Co., et al.*, 228 F. Supp. 171, 191.

Dr. Peter G. Bennett, a psychiatrist, was asked to define pornography in psychiatric terms. He stated his opinion that pornography was more than an intense stimulation of erotic feelings, which in itself was not harmful or disturbing to the ordinary mature adult. Pornography had, in addition to the erotic stimulation, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience, causing morbid feelings of shame and guilt [R. 260a]. He stated that the average well-adjusted person's deep-seated guilt and shame about some aspects of sex as a result of his early education or lack of it will disappear as the person allows himself to become better acquainted with the subject, and that the anxiety, caused by sexual realism, may even be turned to a fuller enjoyment of life 'as I think might happen to many as a result of reading "The House-Wife's handbook." In his opinion, the characteristic of the mind which was primarily attacked by pornography was its narcotic appeal to the remnant of infantile narcissism which is present in every-one—the selfish wish for total satisfaction without regard for people or responsibility which is characteristic of the newborn child [R. 262a]. Pornography forcibly stimulates intense narcissistic fantasy by portraying orgiastic sexual and sadistic satisfaction in the most compelling and unreal way. "The narcissistic impulses cause a morbid sense of shame and a desire to regress to infancy to some extent even in the well-adjusted mature adult, whereas erotic realism only causes an erotic stimulation without regression for which the aforementioned individual would feel no shame or guilt." [R. 263a].

Dr. Bennett testified that the reading of "The Housewife's Handbook" by a mature person who is not men-

tally ill would not have the effect upon his psyche that he attributed to pornographic material [R. 264a].

He testified that he had read "Eros Vol. 1, No. 4" and that a reading of this volume by an average person would not have the same effect as the reading of the pornographic material which he had described. He thought the predominant effect of some of the articles was sexually stimulating and others was not [R. 265a].

He was of the opinion that there was nothing in Liaison Vol. 1, No. 1 that would sexually stimulate an average individual or create morbid or shameful or licentious thoughts [R. 266a].

On cross-examination by the Assistant United States Attorney, he stated that the intent of the person producing the material was not a factor in his psychiatric definition of pornography. It was his opinion that what the American society as a whole understood to be pornographic, *i.e.*, persons who write things that stimulate sexual curiosity violently for purposes of financial gain, was not his psychiatric definition of pornography [R. 268a].

The trial judge asked Dr. Bennett if the acts of sodomy performed by Dr. Adler on the author as described at page 207 would have any shameful effect on the average reader. Dr. Bennett replied that it would not in the mature person [R. 271a]. The court inquired whether those paragraphs "would suggest to a boy or girl near 21 years of age ways (sodomy) of having sexual intercourse in order to have greater satisfaction" and Dr. Bennett answered, Yes, and that it would be permissible in his opinion. The court asked if Dr. Bennett was speaking of mental or sexual maturity and Bennett re-

plied he was talking of emotional maturity. Dr. Bennett said that he thought that the average 14-year old would not be disturbed by reading such material. The Judge asked if they read this, would they try to do this in order to have greater sexual satisfaction. Dr. Bennett said, no, not at that age. The Judge called his attention to the paragraph preceding the act of sodomy (where Dr. Adler tells the author that her husband was sick, when he said that there were more important things than sex etc.) and asked him if that would have any shameful effect on a reader or suggest a moral code that it was all right to have sexual relations with one not your spouse. Dr. Bennett agreed that was the author's opinion but stated it would not create any shameful effects. He was of the opinion that "A reader who is old enough to wade through this book—and by that I mean 12, 13, 14—would recognize that this is the author's opinion but not necessarily the moral code or the code of society."

George Von Hilsheimer, III, a Southern Baptist minister, who was trained in psychology and had done some counseling and therapy with the underprivileged in both urban and rural areas, testified to the attitudes toward sex held by Christian groups and to certain changes that have recently occurred [R. 281a].

He said that he first saw 'The Housewife's Handbook' in 1960 when one of his colleagues gave him a copy. He had used it since in his pastoral counseling and in his psychological counseling with married women who have a sense of shame, as a means of ventilating that sense of shame [R. 289a]. He was of the opinion that it teaches them their own sexual failures are not unusual [R. 290a]. "We have an almost idolotrous con-

cept of marriage in our country. Little girls are told practically from the moment of birth that this is the one road to happiness and almost to salvation. They are told that somehow a mystical magical experience is going to occur with this marriage that was made in heaven, which is a heretical theological notion in itself. They will meet the man of their dreams, he will be perfect for them, they will marry and things will be lovely and beautiful thereafter. They are told this by comic books, by television, by movies, by every possible medium of public culture. They are told a lie. They are told a myth . . . Now it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'you are not alone. This is the experience of many, many people,' and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. . . ." [R. 291a]. In his opinion the book was a straightforward recount of a fairly unhappy history of a fairly typical woman and was not drawn far from the average middle American experience. Although he thought the standard marriage manuals helpful, the language was too complicated [R. 292a].

On cross-examination by the Assistant United States Attorney he indicated he did not use the book as a blueprint for what one was supposed to do but used it as a means of ventilating a sense of shame [R. 294a]. It's main value was that it discussed in quite simple

terms things which were not ordinarily discussed. He said he would give the book to the person being counseled with a comment, "If you think you have difficulties . . . then look at the book in this way and see what it has to teach you." He did not supervise since he believed that people can read freely and have the ability to solve their own problems without his intimate and daily guidance." [R. 295a].

The trial judge asked if it was the kind of a book that he would like to have in the library of his home if he had a 14, 15 or 16-year old son or daughter. The Reverend replied that it was in his library at home and that his wife and the teenage children in his parish read it [R. 296a]. The Judge asked him if, in his opinion, the things discussed related to matters of sexual perversion [R. 296a]. The Reverend replied that the kinds of relationships the author describes were not commonly held by psychologists as perversions, but whether or not this is true, such was a "part of these children's lives, the material that is freely available to them is the hardcore pornography, shamefully discussing lewd, prurient kinds of garbage. . . ." "This kind of book in the setting of a person they trust and respect who has said, 'Read it, We will discuss it' will form the relationship of a new kind of understanding." "If I am to work effectively with them I must have means to read, of talk, or give them to read that with ease they can talk about things they do know about in a distorted way, and then we can talk about what is the kind of relationship you should have and I should have, and the proper kind of relationship." [R. 297a].

The Court asked: "How about the person who reads the book and doesn't have the reverend to go to talk

to him about it and believes this is a code of morals that should be followed as set forth in this book?" The Reverend answered: "This is one of the difficulties to me of pornography." [R. 297a]. The Reverend did not think any person, particularly a teenager, reading the book was going to be convinced that adultery was a proper way of life [R. 298a]. He thought the book would be read "in the context of what kids and adults are saying to each other." [R. 300a].

Asked by the Judge if he thought that wide circulation of the book would be perfectly all right, he said that he thought it would serve as a ventilation from all the kinds of horrible trash that was freely available, the books on any newsstand which show sodomy, lesbianism, homosexuality and adultery freely practiced [R. 305a]. Asked by the Judge if such wasn't in this, book, he replied: "But dealt with in an unshameful way, a dry way, a straight forward way." [R. 305a]. He said that he worked with children "whose common expression is a four-letter expression. This is their form of greeting and this is common and extending in our culture. I work with adults whose common form of recreation is the telling of dirty and sometimes obscene and pornographic stories" and that the book has "a tremendous value in this kind of counseling." [R. 307a].

Asked by the Trial Judge whether he would approve of the methods of sexual relationship set forth in the book (sodomy) the Reverend replied, "No, I would say again that the intimate relationships of a loving couple in marriage, so long as they have developed naturally and with regard for the integrity of one another, that there is no such thing as perversion." The Judge then asked him to read the passages on pages 207 describing

the sodomy act and asked him the question with regard to the relationship that is there (between the female author and the male doctor, unmarried). The Reverend replied, "I repeat, this was not described—so long as it is in the boundaries I have stated—this does not describe a perversion and it describes a kind of sexual relationship which is generally regarded as quite permissible and proper so long as it is within the right framework." [R. 311a.]

The defense rested its case.

United States of America: Rebuttal.

The United States Government called three witnesses, two psychiatrists and one minister. It was stipulated that their testimony was to be considered for rebuttal purposes only [R. 335a].

Dr. Nicholas George Frignito, a psychiatrist, testified that in his opinion "The Handbook" had no medical value, because it gave a distorted viewpoint of the sexual behavior of women and the type of behavior that is prevalent in our community, that it fosters sexual perversity and implies adultery, fornication and sexual perversion are all right [R. 320a].

In his opinion it was a danger to the majority but was not a threat to professional people who had training and knowledge in this sort of business [R. 321a]. This type of material would be dangerous for an adult boy in that it encourages all types of sexual behaviors such as masturbation and increases sexual promiscuity [R. 322a]. It would incite the average 14-year old to sexual misconduct [R. 323a] and lead to "self abuse, masturbation and that would lead to other types of sexual activity" [R. 324a]. As to the average adult person it

would stimulate his prurient interest and certainly would mislead him into believing that such was acceptable behavior in our community. The prurient interest he referred to was "the stimulation by writing or pornographic books to sexual misconduct or instilling lustful feelings" [R. 324a].

Asked on cross-examination by the defense counsel whether the authoress' view toward sexual practice was widely held by other commentators on sex, he answered, "I don't know the exact number, but those men that I associate with rather closely do not hold to this type of sexual behavior. I would say that the majority of psychiatrists that I am in contact with do not approve of say abnormal, aberrant sexual acts." [R. 327a].

Dr. Ann Hankins Ford, a psychiatrist, testified that she had read "The Housewife's Handbook," and that in her opinion it had no medical value. In the field of psychiatry in which she was involved (disturbed persons) it would be a destructive book [R. 337a, 339a]. In her opinion the authoress was emotionally very immature, a very disturbed person, who had not progressed emotionally from the age of childhood when people are in a normal homosexual stage [R. 337a]. Asked if the book had any medical message to it, she replied the only message she found in the book was "if you are dissatisfied with your husband look around and get some other man" [R. 338a]. "The clitoris is a remnant of the male penis from fetal development and this is so emphasized in this book, it is the only penis this woman has, and she all but works it to death. She must have this recognized. She must have great male attention paid to her substitute penis, and in this way she is not

making love to the men. This is not a lovers' relationship; it is a matter of demeaning, sullyng these men whom she comes in contact with." [R. 338a]. The author is so confused and far from understanding what her problem is that it would reinforce the anguish and feelings of hostility" that patients in a similar situation had [R. 338a]. It would not have any value in the treatment or counseling of her patients but would be more disturbing to them [R. 338a].

Reverend Adolph Emil Kannwischer, a Baptist minister and Professor of Psychology, testified that he would not use the "Housewife's Handbook" in counseling parishoners or people because he regarded it was detrimental to a person who already was having problems. He saw no positive value in it [R. 344a].

The United States Government rested its case.

The Assistant United States Attorney's motion to strike Exhibits D-1 through D-43 and the testimony of the expert witnesses regarding responses of the average person and community standards was refused [R. 347a].

The defense attorney's motion for a judgment of acquittal was refused [R. 348a].

The trial judge found the defendants guilty on all counts. The trial court's opinion appears at R. 355a and in *United States v. Ralph Ginzburg et al.*, 224 F. Supp. 129 (Nov. 21, 1963). On December 19, 1963, the trial judge sentenced petitioner Ginzburg to five years' imprisonment and a fine of \$28,000. and fined the corporate defendants \$500 on each count [R. 373a-376a]. (A notice of appeal was filed on the same day). [R. 380a].

The United States Court of Appeals, Third Circuit, affirmed the judgment of the District Court in *United States v. Ralph Ginzburg et al.*, 338 F. 2d 12 (Nov. 6, 1964). This opinion appears at R. 385a.

Summary of Argument.

I.

The public policy of the United States Supreme Court has always championed the obscenity laws. Yet with all of this case law support, the communities are being inundated by a horde of obscenity which the law is not reaching.

The prosecutors are claiming that they have no remedy and that the Supreme Court stands too eager to reverse their successes, when they occur. *Amicus* do not picture this to be the true situation.

This Court recognizes that the debasement of sex has been with mankind down through the centuries and that the obscenity laws are necessary for a strong community life. The *Roth-Alberts* decision is testimony of the fact that criminal penalties are authorized procedures to regulate this type of conduct.

Most of the recent cases before this Court since 1957 have involved "previous restraint" controls, such as movie licensing cases, search warrant procedures, the right of the postmaster to refuse mail on the grounds it is obscene, etc. Whereas an earlier Court in *Near v. Minnesota* had indicated "previous restraint" could clearly be employed against obscene materials, this modern Court has restricted that interpretation considerably by procedural rules. In doing so, a number of obscenity judgments were reversed on procedural grounds, making it appear that this Court was releasing the matter as

not being obscene. Such decisions have misled and discouraged prosecutors.

In several cases the justices have been unable to agree on an "Opinion of the Court." The theories of the case set forth by the individual justices do not lead to an orderly understanding of the law.

On the other hand, this Court has denied review in at least 21 criminal cases which have come before it since 1957. These cases were without opinion and have not been publicized. They are not generally known to the individual prosecutors, who lose heart when they see all losses and no victories.

Then too, some prosecutors do not recognize the distinction between criminal prosecutions and previous restraint cases. A favorable written opinion confirming the trial court's findings in this criminal case is essential to the people's cause if we are to break the stalemate. The prosecutors need a direct signal from the Court, that they can retain their victories in criminal cases.

II.

Petitioners waived a jury at the outset and placed their fate in the hands of the trial judge. They should not be allowed to argue on appeal issues which would not have been available to them had a jury tried the matter.

The trial judge was receptive to all that the petitioners had to offer in the way of evidence. He was not required to accept their theory of the case, in view of

the subject matter and conduct of the petitioners, which spoke for itself.

If this Court, in its decision in *Roth-Alberts* actually passed upon the obscenity *vel non* of such subject matter, that case should be controlling here, because of the similarity of the material and operations of the petitioners.

The trial court properly followed the *Roth* standards in holding petitioners' three publications obscene. Evidence of the purpose of the publisher in regard to one publication is probative as to his purpose in the other two, as a common scheme or plan.

Redeeming social value is not determined in a vacuum, but depends upon all of the circumstances. The variable nature of obscenity requires this. The obscene portions of the material must be balanced against its affirmative values in determining the predominant appeal taken as a whole.

ARGUMENT.

I.

An Integrated Review of the Obscenity Case Law. A. Public Policy.

The public policy of this Court has always championed the obscenity laws. See *Rosen v. U. S.*, 161 U.S. 606 (1896),¹ decided by the U.S. Supreme Court at the turn of the century. This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal² by tolerating anything which tends to debase public morals.

¹Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint (referred to by the court as "the record"), he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of an earlier Massachusetts Supreme Court decision at page 608:

"It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

His Massachusetts reference was the first recorded case in the United States against a book, *Commonwealth v. Holmes*, (1821). The book in the Massachusetts case was "Fanny Hill," a century and a half later to find its way before this Court in *A Book Named "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, October Term, No. 368.

²Webster's Collegiate Dictionary, Fifth Edition, defines "scandal" as "The distressing effect on others of unseemly or unrighteous conduct; especially, an occasion of another's lapse in faith or morals as to give scandal to one's children . . . 3. That which offends established moral conceptions or disgraces all who are associated or involved." Tolerance of indecency, for any reason, even for purposes of administration, had the undesirable effect of giving notoriety and acceptance to the material and dignifying its appearance.

Less than 35 years ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)³ the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

" . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

³"The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' *Schenck v. United States*, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Our emphasis.)

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed 919 (1952) agreed with the *Chaplinsky Court*, adding:

“Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . .”

When, five years later, in *Roth v. U.S.* and *Alberts v. California*, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed 2d, 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S.* (*supra*), *Near v. Minnesota* (*supra*), *Chaplinski v. New Hampshire* (*supra*), and *Beauharnais v. Illinois* (*supra*) were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinski* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

Under such a regime, it did appear as though the communities had the proper defense mechanisms and the modern assault on public morality could easily be turned back.

Yet with all this unanimity, elegance of language, and profuseness of citation to buttress the foundations of our anti-obscenity fortresses, the stockades are presently in danger of collapsing for lack of riflemen, abetted by confusion. The communities of this nation, eight years later, find themselves with a horde of filth, printed, visual, vocal and otherwise, of unprecedented force, threatening to erode the very foundations of the basic morality upon which our nation and our Constitution were founded.⁴ In the face of this peril the public prose-

⁴"A tide of printed filth is advancing across the land in a way which should give every wholesome-thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded.

In bookstores, railroad stations, air terminals, drug stores, everywhere that print is displayed and pictures revealed, there stand pyramids of smut, pornography and obscenity contaminating the very air in which they rest. Language which would be too raw and grating for the dives of opium-smoking debauchees degrades and defaces the paper which carries it.

Magazines with pictures and sketches that would disgrace oriental harems are sold to children as if they were as innocuous as bags of popcorn. Exotic rites that would bring the blush of shame to the faces of the most primitive tribes are described with nonchalance in high-priced books, medium-priced books, and low-priced books. Themes which should be the subject only for clinical studies in the hospitals for the criminal insane are turned into scarifying stories which are bound to bring harm to the youths into whose hands they fall.

Acts of degeneracy and unnatural conduct are being portrayed in contemporary literature as if they were normal and accepted practice in civilized life. Adultery and every other type of illegal and sinful conduct is being depicted glamorously, as if calling for emulation.

The healthful, romantic, and poetic relationship between man and woman is being treated in the basest and most animalistic terms.

Under the false guise of instruction and knowledge, so-called manuals on marriage are being turned out in myriads of copies for the sole purpose of appealing to prurient and lascivious minds. The sick outpourings of degenerate brains are being bound in hardback books and paperback books and sometimes in elegant and expensive leather. Titles and cover pictures which in themselves

cutor bleats that he has no remedy and that it is useless to prosecute, since the Supreme Court will reverse the jury's findings.

CDL is at complete odds with such ideology. Unlike our knowledge of outer space, which is increasing in geometric proportions through discoveries in space explorations, our knowledge of sex is profound, for sex has been with us since the beginning of mankind. As to the sexual relation, it can be said, with some degree of truth, that there is "nothing new under the sun." Similarly, the assault which has as its objective the debasement of sex has been with mankind down through the centuries. That which motivates the pornographer, in 1965, motivated John Cleland two centuries earlier. Recognition of the universal need for strong community

are suggestive, pornographic, indecent and obscene shout their vulgarity to passersby.

It used to be that pornographic literature, to the extent that it existed, was sold clandestinely. The secrecy and the furtiveness with which it was sold and circulated was an indication that the public looked upon it as something improper and not in consonance with the morals of the community. But now the most salacious books, the most degrading publications are sold in book stores, drug stores, five and ten cent stores, and at the newsstands. It is difficult to think of a place where print appears that one's eyes and spirit will not be assailed by pornography of the vilest character.

In short, a wide river of filth is sweeping across the nation, befouling its shores and spreading over the land its nauseating stench. But, what is most disturbing of all, is that persons, whose noses should be particularly sensitive to this olfactory assault, do not smell it at all. I refer to district attorneys and prosecuting officers throughout the nation. Of course, there are a large number of district attorneys in the country who are doing their duty and doing it well, but a larger number of prosecuting officials are shrugging unconcerned shoulders at this violent assault on law, morality and decency."

... From an address given by Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court at the Waldorf-Astoria New York City on October 23, 1965.

controls in this modern era has amply been witnessed by this Court in *Roth-Alberts* when it said at page 484:

“But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1942 to 1956. . . .”

Nevertheless, there is, in our opinion, a crisis facing this nation which requires the members of this Court to bear witness through concrete action and to drive home, once and for all, the basic fact, which is escaping so many at the present time, that this Court really has not, in its decisions since *Roth-Alberts* underwritten the sale of “perversion for profit.”

If we understand correctly what has occurred in the ensuing years since *Roth-Alberts*, this Court has not altered the basic position taken by it in those cases; namely that criminal cases which applied the proper standard for judging obscenity, did not offend constitutional privileges. This Court held at page 492:

“In summary then, we hold *that these statutes, applied according to the proper standards for judging obscenity, do not offend constitutional safeguards against convictions* based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . .” (Our emphasis).

B. The Problem of Previous Restraint Cases.

Unfortunately, a line of cases followed which enjoyed in common the element of previous restraint,⁵ a factor not present in the *Roth* and *Alberts* cases, which authorized criminal penalties as the just consequences of the defendants' temerous conduct. This Court did not react as favorably to this new issue as the earlier Courts in *Near v. Minnesota* (*supra*) which had *excluded previous restraint controls* in the case of *obscene publications from the operation of the Blackstone rule*, which held that:

"The liberty of the press is indeed essential to the

⁵Previous (prior) restraint was a major issue in each of the following: *Times Film Corporation v. City of Chicago*, 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 (1957) (Movie license—no opinion), reversing 244 F. 2d 432 (7th Cir. 1957) and 139 F. Supp. 837 (1956); *Mounce v. U. S.*, 355 U.S. 180, 2 L. Ed. 2d 187 (1957) (customs case—no opinion), reversing 247 F. 2d 148 (9th Cir. 1957) and 134 F. Supp. 490 (1955); *One Inc. v. Olesen*, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 249 F. 2d 114 (D.C. Circuit 1957) and 128 F. Supp. 564 (1955); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (Jan. 23, 1961) (movie license) reversing 272 F. 2d 90 (7th Cir. 1959) and 180 F. Supp. 843 (1959); *Marcus v. Kansas City Search Warrants*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (June 19, 1961) (Seizure), reversing 344 S.W. 2d 119 (1960); *Manual Enterprises Inc. v. Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (June 25, 1962) (right to deposit mail), reversing 289 F. 2d 455 (D.C. Circuit 1961); *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (Feb. 18, 1963) (Warnings) reversing 176 A. 2d 393; *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964) (Seizure), reversing 191 Kan. 13, 379 P. 2d 254 (1963); *Freeman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (Mar. 1, 1965) (Movie license), reversing 233 Md. 458, 197 A. 2d 232 (1964); *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York*, 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) (movie license—no opinion).

nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" 4 Bl. Com. 151, 152.

The cloud of confusion which was to appear was forecast in *Kingsley Book Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (June 24, 1957), decided on the same day with *Roth-Alberts*. In that case, this Court split five-to-four in approving the New York injunctive action, which authorized limited previous restraint. It was here that Justice Brennan and Warren parted company with the majority in the *Roth* and the earlier Courts.

The confusion and disruption commenced one year later with the *per curiam* reversals without opinion in the *Times Film Corporation, One Inc.*, and *Sunshine Book Co.* cases⁶ (cited in footnote 5). Later written

⁶For example, the claim is widespread that Sunshine Book Company stands for the proposition that nudist magazines are not obscene, no matter what may be the publisher's or disseminator's intent, the format, method of distribution, policy of the state etc. See here the recent result in *Connecticut v. Martin et al.* (June 17, 1965), where the Appellate Division of the Circuit Court reversed (2-1) an extremely well reasoned trial court opinion, solely upon the basis of the *Sunshine Book Co.* case. We believe such claim to be utterly groundless. See *Outdoor American Corporation v. City of Philadelphia*, 333 F. 2d 1963 (June 30, 1964) certiorari denied 85 S. Ct. 192, 13 L. Ed. 2d 176 (Nov. 9, 1964); *Luros v. Hanson*, petition for certiorari filed Sept. 27, 1965, Oct. Term, 1965 No. 620; *Hadley v. Arkansas*, 205 Ark. 1027, 172 S.W. 2d 237 (1943); *King v. Commonwealth*, 233 S.W. 2d 522 (Oct. 20, 1950); *Missouri v. Becker*, 364 Mo. 1079, 272 S.W. 2d 283 (1954), cited with approval in

opinions in *Marcus, Manual Enterprises, Inc. and A Quantity of Books* gave specific recognition to the fact that the obscenity issue was not reached in this Court's reversals of those lower Court judgments on previous restraint grounds. What factor the previous restraint element played in the 1958 decisions will never be known.⁷ Subsequent opinions have revealed a common disagreement between the justices on what constitutes the vital phase of the case. See the No Clear Majority Decisions, *infra*. Then too, the Court's membership has changed.⁸

As breeding grounds, the 1958 *per curiam* reversals acted with catalytic action to spawn the "hard core pornography" rule in one of the major centers of pornographic production in the United States. *New York v. Richmond County News Co.*, 175 N.E. 2d 681 (May 25,

Roth-Alberts at footnote 26; *Sunshine Publishing Co. v. George N. Parris* (unreported, Circuit Court, Macomb County April 29, 1963); *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (Mar. 13, 1964); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); *City of Phoenix v. Fine* (unreported, Superior Court Maricopa County, Arizona (Jan. 22, 1965); *Missouri v. Vollmar*, 389 S.W. 2d 20 (Mar. 8, 1965); *Virginia v. Dave Rosenbloom* (unreported, Suffolk County, Richmond, Virginia, June 10, 1965); *Arizona v. Arizona Magazine Distributors Inc.* (unreported, West Phoenix Justice Court, Maricopa County, (Aug. 26, 1965); *Arizona v. Al Sacks* (unreported, West Phoenix Justice Court, Maricopa County (Sept. 1, 1965).

⁷The *per curiam* decisions are criticized in "Obscenity, Pornography and Censorship by Thomas R. Mulroy of the Illinois Bar in 49 American Bar Association Journal (Sept. 1963) at 869. The author cites Justice Jackson's remarks on the empirical reversal of a case without opinion in *Brownell v. Singer*, 347 U.S. 403 (1954):

"The Court's one-word decision reverses concurring judgments of three highly respected courts . . . (by citing) a single case. . . . I think this Court owed those Courts and the legal profession something more than reference to an inapplicable decision."

⁸Justices Frankfurter, Whittaker and Burton have been replaced by Justices Fortas, White and Stewart.

1961.)⁹ Abetted by a misconstruction of the no clear majority opinion decision in the *Manual Enterprises Inc.* case and a misapplication of the special view entertained by Justice Harlan in federal cases, the "hard core pornography" rule spread to the other major centers of pornographic production. *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (July 2, 1963).¹⁰

C. The No Clear Majority Decisions.

The common disagreement between the justices has given birth to a number of "no clear majority" decisions which confound and confuse.¹¹ *Manual Enter-*

⁹There is reason to believe that had Justice Desmond recognized the significance of the previous restraint issue in the 1958 cases, his deciding vote would have been cast differently and the minority in that case would have prevailed. See Justice Desmond's concurring opinion in the *Richmond County News Co.* case, his concurring opinion in *People v. Fritch*, 13 N.Y. 2d 119 (June 10, 1963), and his dissenting opinions in *Larkin v. G. I. Distributors Inc.*, 14 N.Y. 2d 869 (June 10, 1964); *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399 (July 10, 1964); *People v. The Bookcase Inc. et al.*, 14 N.Y. 2d 409 (July 10, 1964).

¹⁰That the California Supreme Court misinterpreted the Harlan view seems apparent from Justice Harlan's vote to deny certiorari in *Grove Press Inc. v. Gerstein*, 378 U.S. 577 (June 22, 1964), a state case. The language of the *Zeitlin* case suggests however, that the author would have come by the same result no matter how he chose to interpret Justice Harlan's opinion in the *Manual Enterprises* case.

¹¹One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." If a majority agree on the result, but do not agree in the reasoning for the result, there is no "opinion of the court," even though the controversy is ended as between the parties to the lawsuit.

The decision plus the reasoning found in the "opinion of the court" determine the precedent value of any particular case. In many obscenity cases, however, there has been no "opinion of

prises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Grove Press Inc. v. Gerstein*, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); *Tralins v. Gerstein*, 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964). The order in appearance of an opinion, rather than solid precedent, often controls the destiny of the people's defenses against the assaults on public morality.¹²

the court," as where the majority have agreed *only* upon the *result*, (i.e., judgment reversed) but have not been able to agree upon the supporting reasoning.

Text books on judicial precedent indicates that theoretically the "no-clear-majority" decision stands only for its general result. See Wambaugh, *The Study of Cases* (Second Edition, 1894), at page 50:

"Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.'"

See also Black, *Handbook of Judicial Precedent* (1912), pages 135-136:

"If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

¹²The confusion of the State courts as to what is taking place in the United States Supreme Court is spotlighted in *Arizona v. Locks*, 97 Ariz. 148, 397 P. 2d 949 (Dec. 30, 1964). That court said, in error, at page 951:

"This was followed by *Manual Enterprises Inc. v. Day*, 370 U.S. 478 . . . holding the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. (Our emphasis)."

The Arizona Supreme Court's reversal of a jury decision on girlie magazine subject matter was based largely on a compari-

D. A Major National Problem.

In the absence of knowledgeable defending riflemen, compounded by the confusion, those well-buttressed fortresses are being subjected to a withering attack. On October 21, 1965, the Los Angeles County Grand Jury returned a two count indictment against 14 defendants in *California v. Milton Luros, et al.*, Superior Court case No. 295,183, for conspiracy to manufacture and distribute girlie magazines, nudest magazines and nine lesbian-type paperback books (including Fanny Hill). On February 15, 1965, the count covering the girlie and nudist magazines was dismissed without trial in a pre-trial motion to dismiss the indictment. Superior Court Judge Walter R. Evans, in dismissing, had this to say:

"In view of the time I have had to study it, I have found it extremely interesting, but absolutely amazing. I was concerned as to the extent to which the United States Supreme Court—I am very frank to say, and I think I am entitled to say it, that I disagree wholeheartedly with the United States Supreme Court cases. I think the so-called founding fathers who promulgated our Constitution probably would turn over in their graves if they saw the extent to which the United States Supreme Court has stretched the protection to this type of material which to me, has no value to anybody. However, that is my personal position. I want to get that off my chest. I think there is nothing but filth from beginning to end in this material. However,

son with this erroneous reference and belief that Justice Harlan's opinion was the opinion of the Court. The Arizona Court had indicated a different view on the subject matter when the case was before it previously in 372 P. 2d 724 (June 20, 1962) and 382 P. 2d 241 (May 25, 1963).

that is my personal opinion, and I think that counsel pointed out that I still have an obligation to follow what I think are the rules laid down by the United States Supreme Court. I was interested in reading one of the learned justices who said that maybe some day the balance will start swinging back where honesty and decency would start entering into a consideration of this thing. I hope it will."

He thought eight of the lesbian-type paperbacks (but strangely, not Fanny Hill) a jury issue, and Count 2 was set for trial. The people's action was short lived however. Although both the District Court of Appeal and the California Supreme Court thereafter refused the defendants a writ of prohibition on the count involving the lesbian-type paperback books, Trial Judge Joseph Sprankle dismissed the case, without trial on June 14, 1965. The books' titles, Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment and Honey Lips, sung out the perversion they peddled.

In another action by the people—this time against a notorious national disseminator located in New York—a criminal obscenity indictment was short-circuited by trial judge J. Irwin Shapiro, when he dismissed *New York v. Ray Kirk, Birch, All State News Co. Inc., et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. In so holding, Judge Shapiro refused to follow controlling precedent in his state, for one of the books supporting the indictment had already been held obscene by New York's highest court in *New York v. Harry Fried*, 18 A. 2d 996, 238 N.Y.S. 2d 742 (Mar. 26, 1963). Appeal dismissed for want of jurisdiction.

Treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justice Black, Douglas and Stewart are of the opinion probable jurisdiction should be voted and judgment reversed 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 22, 1964)).¹³

E. A Problem of Communication.

The confused results reached in the lower courts noted above does not seem warranted to CDL, when one considers the overwhelming weight of case law in the opposite direction. The key to an awakening of law enforcement seems bound up in the remarks of Chief Justice Warren in *Jacobellis v. Ohio* (*supra*) at page 1684:

"... This Court hears cases such as the instant one not merely to rule upon the alleged obscenity

¹³Federal courts are equally confused. See *United States v. Klaw and Jack Kramer*, 350 F. 2d 155 (2nd Circuit July 15, 1965) and *Haldeman v. U.S.*, 340 F. 2d 59, 62 at fn. 6 (10th Cir. Jan. 13, 1965):

"Mr. Justice Stewart, concurring in *Jacobellis*, declined to define the term 'hard-core pornography,' but stated: 'I know it when I see it . . .' The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters . . ."

When District Judge George Templar found himself reversed as the trial judge in the *Haldeman* case, he turned around and dismissed two major federal grand jury indictments against nationally notorious smut peddlers: Louis Linetsky aka John Am-slow & Co. in *United States v. Linetsky*, No. T-CR 582 (D.C. Kansas) (June 24, 1965) and an equally notorious smut merchant in *United States v. Wasserman* (D.C. Kansas) No. T-CR-581 (June 29, 1965). The former involved girlie magazines and illustrations of females in the nude and the latter involved motion picture films, compare these results with *Roth-Alberts* (*supra*); *Frank L. Collier v. U.S.* (*infra*); *Herman L. Womack v. U.S.* (*infra*); *Chobot v. Wisc.* (*infra*); *Roy A. Oakley v. U.S.* (*infra*) *Monfred v. Maryland* (*infra*); *Heinecke v. U.S.* (*infra*); *Goldstein v. Virginia* (*infra*); *Wenzler and Imlay v. Calif.* (*infra*).

of a specific film or book but to establish principles for the guidance of lower courts and legislatures. *Yet most of our decisions since Roth have been given without opinion and have thus failed to furnish such guidance. . . .*" (our emphasis).

With the exception of the four *per curiam* decisions in 1958, the only obscenity decisions since Roth-Alberts which have been without opinion, were those in which this Court has dismissed an appeal or denied certiorari. This Court should call attention to these decisions denying certiorari and dismissing appeals. In so far as we have been able to ascertain they are 21 in number:

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.*, 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 274 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L.

Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961) rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Roy A. Oakley v. U. S. (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" "Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ

of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari), 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in *New York v. Mishkin*, also before this court), writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named), 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, III, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "Sex Cat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, writ of certiorari denied (Justice Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied U.S., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice

Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, U.S., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

There is rarely any mention made in a trial court or in a State Supreme Court of any of the criminal convictions, which this Court has refused to reverse, or the obscene matter involved in those cases. The rare exception is *Connecticut v. Andrews*, 150 Conn. 92, 186 A. 2d 546 (1962), which, in answer to the defendant's claim that the girlie magazines "Modern Man" (July 1960) and "Modern Man—Yearbook of Queens" were not obscene, said:

"The defendant's claim that there were no obscene magazines to support his conviction on the first and second counts is without merit. *Monfred v. State*, 226 Md. 312, 317, 173 A. 2d 173, Cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2 386; *State v. Chobot*, 12 Wisc. 2, 110, 116, 106 NW2 286, dismissed, for lack of a substantial federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed2 85. . . ."

The end result it that the people's cause suffers. The bad cases are highlighted and the good cases go unnoticed.

The Connecticut Supreme Court has recognized what in our opinion appears to be good logic and good law if the United States Supreme Court must, in each instance make a constitutional judgment as to whether any given subject matter is either, as a matter of law, protected speech; or a question of fact on the issue of obscenity, for the jury to decide, then a denial of review

(either by dismissal of an appeal or by denial of certiorari) places the material in the latter category.¹⁴

F. Reconciling the Cases.

When the obscenity statutes have been applied as *criminal statutes* trying "conduct," the People's case has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1674. Unfortunately, the United States Supreme Court has failed to publicize such results by way of formal opinion.

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio*, 84 S. Ct. 1674 (June 22, 1964), makes it clear that this Court is not defending obscenity, but that *it only appears to do so* when it is faced with procedurally bad cases, at page 1685:

"There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do— for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

¹⁴The general rule of law that denial of certiorari means "nothing" or "nothing much," would seem to have little application in free speech cases. See *Supreme Court Practice*, 3rd Ed., Stern and Gressman, P. 182, where the authors discuss this point in writs of habeas corpus cases.

Our analysis points to a major point of distinction between those cases which draw into issue the conduct of an individual and those which involve "prior restraint." The final results have certainly been distinguishable. The seven year history points to a course of conduct which has meaning.

The "procedurally bad cases" referred to by Justice Warren were not criminal cases involving "conduct" but were the cases cited in footnote 5, involving "prior restraint." Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and Postmaster cases and mass seizures under search warrants). "Due process" considerations were a major issue in such cases. See here, the four *Per Curiam* decisions in 1958 (prior restraint—no jury trial on the issue of obscenity; material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove his right to distribute by injunctive action); *Marcus v. Kansas City Search Warrants*, 367 U.S. 717, (prior restraint—mass seizure under general search warrant, non-criminal proceeding aimed at destruction of subject matter rather than at conduct of vendor); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 48 (prior restraint—boycott, rather than criminal trial of vendor); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (prior restraint—material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove right to distribute by bringing an injunctive action); *A Quantity of Books v. Kansas*, 84 S. Ct. 1723 (prior restraint—mass seizure, non-criminal proceedings aimed at destruction of subject matter, rather than at conduct of vendor, no right to jury trial on issue of obscenity). *Freedman v. Maryland*, 380 U.S. 51 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action); *Trans-Lux Distributing Corp. v. Board of Regents of New York*, 380 U.S. 259 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action).

In all of these cases, the People could have brought the criminal action and held the defendant accountable for his "conduct" (with the procedural safeguards of criminal procedure, *i.e.*, jury trial and burden of proof) and avoided the prior restraint issue. They chose the "prior restraint" attack in preference, unaware that this Court's policy was to give *Near v. Minnesota* as narrow a construction as possible. Unfortunately, the disinterested prosecutor pictured above, at this late date, is unaware of this basic distinction in the case law. Furthermore, he is unwilling to pursue the distinction, though convinced by logic, without a more direct signal from this Court.

It appears symbolic therefore that, in this climate of stalemate, petitioners Ginzburg, *et al.* and Mishkin should now find themselves before this Court at the same time in criminal cases. Their respective operations are as unto *Roth* and *Alberts* as peas in a pod.¹⁵

This Court must now decide if it meant what it said when it put pornographers Roth and Alberts out of business in 1957.

¹⁵The reporter's comments in the American Law Institute, Model Penal Code (1957 draft) section 207.10 at page 14 describes the obscenity offense:

"The gist of the offense we envision, therefore, is a kind of 'pandering' "

which accurately describes their separate activities. At page 13, the reporter comments:

"The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain can be eliminated, the supply would be cut off at the source . . ."

II.

This Court Should Affirm the Judgment.

A. Introduction.

One should bear in mind at the outset that this is not the case of a defendant who has been deprived of a right to trial by a jury of his peers in the community in which the crime occurred. Under the Federal Statute, of which the Petitioners stand convicted, they had a clear right to a trial by 12 jurors and the benefit of the burden of proof in criminal cases, which requires the prosecutor to prove to each and every one of these 12 jurors, that the defendant's conduct was unlawful, beyond a reasonable doubt. They waived that right at the outset, but not without reason, for "defendants in obscenity cases want nothing so little as a jury trial"¹⁶ XL Notre Dame Lawyer, No. 1 at page 10 (Dec. 1964). *Bromberg, Five Tests for Obscenity*, 41 Chicago Bar Record, 416, 418 (1960).

Having made that waiver, and placed their fate in the hands of the trial judge, they now argue on appeal that which would not be available to them in the case of a jury verdict. Though ever so subtle, the argument is that it was the subjective feelings of the trial judge which decided the matter, not the community's sense of responsibility.

¹⁶"Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested method of trial by jury . . ." *Bromberg, Five Tests for Obscenity*, 41 Chicago Bar Record 416, 418 (1960).

"Are they not telling the justices that they believe they can prevail only if the community standard is *not* applied? The Court hasn't gotten the message . . ." XL Notre Dame Lawyer No. 1, 10 (Dec. 1964).

At page 28 of their brief, the petitioners argue "‘Customary limits of candor’ are still measured by the type of material a trial judge would have in *his* library or upon *his* coffee table." At page 29: "Attempts to treat these concepts as objective standards and to offer evidence in traditional form on whether a particular work can, by such standards, be judged ‘obscene’ are rebuffed by triers of fact whose subjective reaction to the work is too strong to permit enlightenment by objective proof." At page 34: "Experts on mass culture . . . are in a much better position to know what society now tolerates than a judge whose personal reading habits may be quite different from those of the crowd." At page 43: "It does not appear that the trial court had any special knowledge on matters literary or artistic. What the trial judge did then was to ‘arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence . . .’ Had the case been tried to a jury, their arguments would have been swallowed up in the jury verdict and the result should not be different here. Having waived the jury, petitioners should not be permitted to argue what a jury *would have found as to* ‘customary limits of candor,’ ‘what objective proof constitutes enlightenment,’ ‘what society tolerates,’ or ‘whether or not the jury would accept the offered expert testimony,’ as against what the trial judge *did in fact* find.

The petitioners find themselves in no better position than petitioner David Alberts who waived a jury trial in *Alberts v. California* (*supra*). As to that defendant, this Court said at page 489:

“Both trial courts below sufficiently followed the proper standard. Both courts used the proper def-

inition of obscenity . . . in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person . . .”

A close reading of the trial transcript reveals no lack of receptivity on the part of the trial judge to the petitioners’ efforts to “enlighten.” That he should reject their theory of the case is understandable upon an examination of the evidence presented at the trial, including the exhibits, defendants’ conduct in relation thereto, and the testimony.

B. The Roth-Alberts Facts Control.

Because the *Roth-Alberts* defendants and materials so closely resemble their counterparts in this and the *Mishkin* case, also before this Court in *Mishkin v. New York*, No. 49, they assume a particular relevance to the issues raised by these defendants. As to the materials involved in *Roth-Alberts*, see 45 Minn. Law Review, 5, 20, *et seq.* and footnotes 88-102.

In *United States v. Roth*, 237 F. 2d 796, 800 (Sept. 18, 1956) Judge Clark in the Court of Appeals, Second Circuit below, said of Roth and his materials:

“As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would

find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison."

In his petition for certiorari, Roth raised an issue that the publications of which he stood convicted were not obscene.¹⁷ One of the books was "American Aphrodite, Vol. 1, No. 3," whose description bears considerable resemblance to "Eros Vol. 1, No. 4."¹⁸ This Court apparently did not consider Roth's claim substantial, for in granting the writ,¹⁹ jurisdiction and arguments were limited²⁰ to three of the other issues in the jurisdictional statement.

¹⁷Petition for Writ of Certiorari, pp. 2-3; 45 Minn. L. Rev. 5, 21.

¹⁸See 45 Minn. L. Rev. 5, 20, at footnotes 88, 89:

"88. The particular issue of *America Aphrodite* was volume 1, number 3, as correctly stated in count 24; the reference to 'Number Thirteen' in count 17 appears to be a typographical error. See Record, pp. 19 & 15 respectively.

Among the distinguished authors whose works appeared in the issue were Herbert Ernest Bates, perhaps best known in the United States for *The Purple Plain*, Rhys Davis, whose *The Trip to London* delighted thousands of its readers. Pierre Louys, famous for *Aphrodite*, and Edwin Beresford Chancellor, author of *The Lives of the Rakes* and many other historical works. Here, too, were pieces by Harold Alfred Manhood, John Cournos, Patrick Kirwan, Henry Miller, and Harry Roskolenko (Colin Ross).

In England, D. Val Baker criticized the Postmaster General's earlier exclusion of *American Aphrodite* from the United States mail, pointing out the genuine literary quality of its contents. Baker, *Aphrodite in Trouble*, 168 Publishers' Circular and Booksellers' Record 924 (1954)."

"89. Record, pp. 1-19; Brief for the United States in Opposition, pp. 12-13 . . . Since the count involving only American Aphrodite included both the book itself and advertisements for it, the sole element of consistency in the verdict is the conclusion that the book was obscene . . ."

¹⁹The granting of writs of certiorari are discretionary. Supreme Court Practice, Third Edition, Stern and Gressman, page 118.

²⁰See 352 U.S. 964 and 45 Minn. L. Rev. 5, 22.

On the other hand, David S. Alberts' approach to this Court was by way of appeal under 28 U.S.C. section 1257,²¹ rather than by petition for writ of certiorari. In his jurisdictional statement, one of the issues raised was whether the statute "upon its face and *as construed and applied*" abridged "freedom of speech, press and thought."²² which should have been sufficient to state grounds for appellate jurisdiction on the issue of obscenity under 28 U.S.C. section 1257.²³ This Court noted probable jurisdiction in *Alberts v. California*, 314 U.S. 160, which theoretically placed the obscenity issue before this Court. Alberts argued the matter to some extent in his briefs.²⁴

In its majority opinion in *Roth-Alberts (supra)*, this Court said on the issue of obscenity *vel non* at page 476, footnote 8:

"No issue is presented in either case concerning the obscenity of the material involved . . ."

Was this Court saying that this issue was so unsubstantial as to require no discussion?—in effect, that

²¹"Where an appeal may properly be taken, the so-called obligatory jurisdiction of the Supreme Court is thereby invoked, in contrast to the discretionary jurisdiction over certiorari cases . . ." Supreme Court Practice, Third Edition, Stern and Gressman, page 63.

²²Jurisdictional Statement, pp. 4-5, 45 Minn. L. Rev. 5, 25.

²³"The 'validity' of a state statute is also said to have been sustained, within the meaning of §1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. This is true even though the statute on its face bears no federal impediment. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts." Supreme Court Practice, Third Edition, Stern and Gressman, p. 67.

²⁴See 45 Minn. L. Rev. 5, 25, and footnotes 110, 111.

without the other major issues the Court would not have written an opinion, but would have dismissed for want of a federal question or affirmed the appeal without opinion as in the case of *Joseph Chobot v. Wisconsin* (*supra*). Or did the Court give Mr. Roth and Mr. Alberts less than justice? Roth was facing a 5-year sentence and \$5,000.00 fine and Alberts was facing a 30-day jail sentence. In their concurring opinions, both Justices Harlan and Warren reviewed the materials.

One commentator has interpreted this footnote to indicate the majority did not treat the obscenity issue. 45 Minn. Law Review 5. But this is inconsistent with the role of the jurist expressed by Justice Brennan, its author in his dissenting opinion in the companion case of *Kingsley Book Inc. v. Brown* (*supra*) at 448:

"Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e. that reasonable men may differ whether the material is obscene . . ."

Later opinions of its author have indicated that review of the subject matter was necessary in free speech cases.²⁵ Justice Brennan would employ the rule as stated in the American Law Institute, Model Penal Code (1962), section 251.4(4) which holds that "The court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."²⁶

²⁵See, for example, the opinion of Justice Brennan, concurred in by Justice Goldberg, in *Jacobellis v. Ohio* (*supra*) at p. 1679:

"Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected . . ."

²⁶*Jacobellis v. Ohio* (*supra*), footnote 6 of Justice Brennan's opinion.

It should also be noted that in the majority opinion, Justice Brennan said at page 489:

"Both *trial courts* below sufficiently *followed* the proper standard. Both courts used the proper definition of obscenity . . ." (our emphasis).

Does the language "*trial courts . . . followed*" indicate that the majority found that the trial court in *Alberts* correctly applied "the proper standards to the material?"

C. The Roth-Alberts Standards.

The majority opinion in *Roth-Alberts* (*supra*) approved four definitions for the word "obscene." At page 486, the federal court sponsored test in *Roth* and the State Court sponsored test in *Alberts* were set forth:

"In *Roth*, the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added.) In *Alberts*, the trial judge applied the test laid down in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d. 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.'"

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant theme and proper audience.

At page 489, Justice Brennan gave tacid approval to a *third* definition in these words:

"Some American courts adopted this standard but later decisions have rejected it and substituted this

test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press . . .”

At page 487, footnote 20, the majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law:

“ . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . . See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*”

D. The Trial Court Followed the Roth-Alberts Standards.

Trial Judge Body properly followed the Roth Standards. He noted preliminarily in his opinion at 224 F. Supp. 129 at 133;

“If material has *any* socially redeeming importance it is protected . . .”

In his investigation into the matter of “social redeeming importance” he applied the facts at bar, and did not move in a vacuum, as petitioners would have this Court do. The variable nature of obscenity requires this.

Burstein v. U.S., 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (Apr. 6, 1936.)

1. *Liaison Vol. 1, No. 1.*

As to "Liaison Vol. 1, No. 1," he found that the three articles, "Slaying the Sex Dragon," "Semen in the Diet," and "Sing A Song of Sex Life" covered the most "perverse and offensive" behavior and that the treatment was "largely superficial". He noted that the defendants' own expert, Magazine Editor Dwight MacDonald, testified that it had "no literary value". If it could be said there was social redeeming importance in the magazine, it had to be found in what it advocated, or in its entertainment value. As to the latter he found the material beyond contemporary community standards "even in applying the liberal night club standards." As to the former it failed "to serve a legitimate purpose of an author in recording human experience or in seeking to accomplish a worthwhile objective." The *only* idea advocated was complete abandon of any restraint with regard to any form of sexual expression, which one can say exists in every form of pornography. He found the pamphlet "designed obviously and solely for the purpose of appealing to the prurient interest of an ordinary person."

Amicus submits the trial judge properly applied the Roth Standards to "Liaison", noting further that the idea expressed by all pornography, *i.e.*, the complete abandonment of any restraint with regard to forms of sexual expression, is too "slight" to be redeeming. *Chaplinski v. New Hampshire (supra)*.

The finding that the pamphlet was "designed" solely for its appeal to prurient interest is supported by the common scheme or plan which attended the creation and

dissimination of "Eros Vol. 1, No. 4" and "The Housewife's Handbook on Selective Promiscuity." A.L.I., Model Penal Code (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

"It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

2. *The Housewife's Handbook of Selective Promiscuity.*

As to "The Housewife's Handbook on Selective Promiscuity" the trial judge noted that, as in the case of "Liaison," no literary merit was ascribed to the book. Its only claim to redeeming value was expert testimony to the effect that it had utility as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. The court expressly rejected that testimony.

The court noted that the author testified under oath it was a factual and highly accurate reporting of actual occurrence, but that he doubted the accuracy of the book (indirectly, her testimony). It met the prescribed tests for pornography—it was a bizarre exaggeration, morbid and offensive. An examination of the book in capsule form, by book outline bears out the correctness of this finding (Appendix A).

The court explained its reason for disbelieving the testimony of the Reverend George von Hilsheimer III, "This same witness shocked the writer by saying that this book should be in every home and available for teen-agers for guidance in sex behavior, but in my opinion misbehavior . . ." It was petitioners' expert witness, Rev. Hilsheimer who first brought up the matter of the book's suitability for use by "youth" [R. 291a]. He volunteered in his direct testimony at R. 291a and R. 292a that it was an "innocent book" which it was necessary for him to give "youth" as a pastoral counselor, if he was going to be responsible "to his youth." The trial judge questioned him further, and it developed that that was what he meant.

It should be noted that petitioners' other expert witness along these lines, Dr. Charles G. McCormick (psychologist) did not agree with Rev. Hilsheimer, who said he did not supervise the reading, [R. 295a]. Dr McCormick applied a restriction [R. 217a] to "guide the person in making distinctions."

Dr. Bennett, the psychiatrist testified that a 14-year old would not be disturbed by the "Handbook." The trial judge had reason to question the standards he employed in his expert testimony on the "effects of the material, and to reject the same.

The determination of obscenity is ultimately with the fact finder and not with the expert witnesses in any event. *United States v. Kennerley*, 209 Fed. 119, 121.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

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The prurient nature of "The Handbook" is attested to by the common scheme or plan which attended the creation and dissemination of "Eros Vol. 1 No. 4" and "Liaison". A.L.I. M.P.C. (1957 draft) section 207.10(2)f. The stipulation as to "knowledge" did not foreclose other admissible evidence on intent for the prosecutor reserved that right [R. 152a].

3. *Eros* Vol. 1 No. 4.

As to "Eros Vol. 1 No. 4" the judge properly construed the "balancing" concept of the A.L.I Model Penal Code (1957 draft) section 207.10 to find no redeeming social importance. This fact is demonstrated by his comparison of the novel *Lady Chatterley's Lover* with the work under scrutiny, "It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity containing excerpts from recognized works of art."

As the Judge noted, the Allen Ginsberg article was a written statement of policy, purposely contrived and disseminated—the destruction of all barriers against sexual behavior of any kind. When this is combined with independent displays of obscenity, the innocent will not shield the obscene.

The question of redeeming social importance must be determined in the light of the facts and not in a vacuum. The variable nature of obscenity requires this. *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (April 6, 1936).

In the case of *Eros*, the items of possible merit and those which are considered innocuous are a mere disguise. The "overriding theme, and the only theme of *Eros* is the advocacy of complete sexual expression of whatever sort and manner." The finding that the magazine was "designed" solely for its appeal to prurient in-

terest is supported by the pattern—the craftily compiled overall effect, which purposely loads the forbidden fruits: “Frank Harris, His Life and Love”, “Bawdy Limericks”, “Natural Superiority of Women as Erotics” and “Black and White in Color” and seeks to ameliorate the criminal liability through the disguise. The whole, however, take on the flavor of the part.

Amicus submits that the “design” of Ginzburg’s operations on Eros to appeal to prurient interests is also supported by the common scheme or plan which attends the creation and dissemination of his other products, “Liaison” and “The Housewives Handbook on Selective Promiscuity.” The stipulation as to “knowledge” did not foreclose other admissible evidence on intent, for the prosecutor reserved that right [R. 152a]. See also A.L.I., M.P.C. (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: “The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. . . .” As to the audience he considered the trial court said:

“It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the

average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

E. Social Importance.

1. It Is Not Determined in a Vacuum.

At page 32 of their brief, petitioners argue "Only if the words of Roth 'utterly without redeeming social importance' mean what they say, can criminal obscenity statutes survive the challenge that they violate the Fifth, Sixth and Fourteenth Amendments. Thus, material found to have some social value may not be suppressed and certainly may not be the basis for criminal conviction of the utterer or disseminator. Only when a work is found to be totally devoid of value can we even begin to subject that work to the other tests which identify actionable obscenity. . . ." Such an argument misconceives the very nature of obscenity—it has a variable quality about it. The guilt or innocence of the act, display, or publication depends not only upon the work but also upon the surrounding circumstances. The time and manner of acting and motives involved are always relevant and may even be determinative. Petitioner's argument lacks a necessary qualification. The value must be considered in light of the circumstances.

For example, at page 50 of their brief, petitioners take issue with the court below, because the trial judge

found that there was "no credible evidence that the 'Handbook' had the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." In doing so, the judge indicated he was not won over by the testimony of the Reverend von Hilsheimer, Dr. Bennett and the author on that score. But assuming that the testimony did indicate some value as a case history or the like, that value cannot be considered alone and in a vacuum, independent of the petitioners' personal conduct in relation thereto.

The classic example is *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1949). A book entitled, "Sterile Sun" had been published by Macauley Company and issued by that company in a special edition, the sale of which was limited to physicians, psychiatrists, sociologists, social workers, educators and other persons having a professional interest in the psychology of adolescents. The book was to be found in the public library upon the restricted shelves. Burstein made copies of the book, omitting the statement of the publisher respecting the limitation of sale, and an introductory note which emphasized the statement that the book was written for a professional group. He gave it a new title called "Confessions of a Prostitute" and mailed circulars advertising the book as "spicy," "too sharp for ordinary consumption" and quoted a few especially salacious and suggestive lines from the book. On his appeal from convictions for both depositing for mailing an obscene book, and depositing for mailing a letter giving information as to where and how the book might be obtained, he argued that the book was not obscene *as a matter of law*. The Court of Appeals for the Ninth

Circuit held that the trial judge was correct in submitting the matter to the jury. Under petitioners theory, Burstein could go on about his business.

District Judge Bryan expressed the same principle in *Poss v. Christenberry*, 179 F. Supp. 411, 416 (Dec. 21, 1959). Poss argued in that case that the *per curiam* decision of this Court in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352, compelled a holding that his circulars, depicting nude photographs which advertised nude movies, photos and color slides, were not obscene. Judge Bryan thought otherwise, at page 416:

"In the circular at bar there is little doubt that the publisher's purpose is to appeal to the salaciously minded. No one could be naive enough to suppose that these photographs have anything whatever to do with 'art.' The circular does not contain any ideas of redeeming social importance.' Nor has it the slightest vestige of literary or artistic merit. The publisher's purpose in putting out the material may well be 'a cardinal determinative.' See *Glanzman v. Schaeffer*, D.C. S.D. N.Y., 143 F. Supp. 243, 247."

See also the discussion at footnote 6.

The Petitioners' attempt to concentrate the investigation on the "thing" rather than the "conduct, in relation to the thing." A number of examples suggest the fallacy of this concept: A person may utter a four letter word, or a stream of such words in the restrictive audience of a group, when such conduct is essential to the portrayal of a character in a play, yet he may find himself in difficulty when he utters those same words over a loud speaker on the grounds of a college campus, in

defiance of community standards. A person may not be in violation of the criminal statutes were he to relieve himself (urinating) out of necessity in a public alley and accidentally be seen by a female from an adjoining yard. The result would be otherwise if he purposely summoned the attention of the female and relieved himself for the purpose of the public exhibition. In obscenity cases as in criminal cases in general, the defendant's conduct is the central issue. As stated by Chief Justice Warren in his concurring opinion in *Roth v. U.S.*, 345 U.S. 476, 494:

"It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

See also Chief Justice Warren's opinions in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469, 1476 (1957), and *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1673, 1685 (1964).

The same principle is very well stated by the Supreme Court of Errors of Connecticut in *Connecticut v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (Dec. 24, 1958):

"Obscene and indecent are not technical terms of law and hence susceptible of fine distinctions. Whether something is obscene or indecent depends upon all of the surrounding circumstances. Section 8567 comprehends material which from its very character a person of sound mind must know was

obscene and indecent. See Wigmore, Evidence (third edition) page 43. It also includes material which by the method of its presentation to the prospective reader or viewer shows a design to appeal to sordid interests. See *Roth v. U.S.*, supra, 354 U.S. 495, 77 S.Ct. 1314 (concurring opinion). To cite an example; if language and pictures describing or portraying human sex organs are contained in a book or brochure on medical science and treat the subject with no more frankness than is required, they would not be obscene or indecent within the statute. But if the same language and pictures were taken from their context and compiled in pamphlet form to be sold or shown to children, they would be. *People v. Muller*, 96 N.Y. 408, 413. The purpose of the statute is to prevent the selling, showing or offering of obscene or indecent material falling within the description stated."

See also the expression of the Supreme Court of Errors of Connecticut to the same effect in *State v. Andrews*, 186 A. 2d 546 at page 550.

2. *Slight Social Importance Does Not Exculpt.*

At page 31 of their brief, petitioners argue, "The First Amendment principle bars suppression of any work of the slightest value, whether the suppression be accomplished by civil order or criminal sanction." This appears to *amicus* as an exaggerated statement of the law, easily responded to. At page 476 of *Roth-Alberts* (*supra*), the majority opinion cited with approval the *Chaplinsky* Court (*supra*) opinion, which held:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punish-

ment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .*"

The very language of the Court indicates that speech may have "slight social value" and yet be subject to punishment, because by its nature it is obscene.

In support of this argument, petitioners, at page 31 of their brief cite language in *Jacobellis v. Ohio* (*supra*) that:

"The constitutional status of the material (may not) be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance . . ."

The language is that of Justice Brennan, concurred in by Justice Goldberg and was not the opinion of this Court. The accuracy of this statement of law is doubtful, if we are to believe that this Court is following prior case law, as reported in the comments to the American Law Institute, Model Penal Code (1957 draft) section 207.10. In this regard the reporter states at page 30:

"The second aspect of the recommended definition, requiring that appeal to prurient interest be the *predominant* appeal of the material, recognizes that a work of art or literature may contain elements of prurient interest, which, however, are subordinate

to other positive values of the work. Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing artistic or other merits of a work against the alleged prurient appeal. . . .* (Our emphasis).

and at page 40:

"11. *Effect of Artistic or Scientific Merit.* The effect of our proposals on definition of the obscene, consideration of the work 'as a whole,' and admissibility of evidence of artistic and other merits is to permit consideration of positive values of the work in determining whether the predominant appeal of the work is to prurient interest. This does not differ substantially from present law."

and at page 42:

"Our reasons for hesitating to relate the definition of obscenity directly to appraisal of artistic merit are as follows. In the first place, great artistry is not necessarily inconsistent with prurient appeal; consummate skill in execution might be the very thing which lends the work its powerful erotic appeal. . . .

Accordingly, we have refrained from making artistic or other merit a direct and independent issue in obscenity trials. On the other hand, it is obvious that the issue of 'predominant appeal' involves not only a judgment that the material in question appeals to prurient interest, but also a judgment that it has this characteristic more than any other. Thus consideration is invited to the question of what other appeal, if any, the material has. And in subsection (2) (c) we expressly provide for the

admissibility of evidence as to artistic, literary, scientific, educational or other merits.

The slight but real difference between a defense or justification on the basis of artistic worth and mere permission to introduce evidence of artistic merit as bearing on the issue of 'predominant appeal' may be seen in the possibility, under the later arrangement, of (1) convicting notwithstanding great artistic competence, where the main appeal is to prurient interest; and (2) acquitting notwithstanding that the material has little or no artistic merit and some, but not much, appeal to prurient interest, in short, is a dull piece with no significant 'appeal', where a trace of the salacious is lost in a sea of inanity.

The ultimate question is how prominent is the appeal to prurient interest in the work as a whole, whatever the value judgment placed on the balance of the work." (Our emphasis).

The employment of such language in a majority opinion of this Court would invite disaster to the federal governments attempts to control obscenity. The language in Justice Brennan's opinion was taken from the California Supreme Court opinion in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 31 Cal. Rptr. 800, 813, 383 P. 2d 152, 165 (1963) where it has brought about a sterilization of obscenity law enforcement in that state. See also the incongruous result reached by four members of the New York Court of Appeals, holding that classic of pornography, Fanny Hill not obscene in *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 74, because:

"It has a *slight literary value* and it affords *some insight* into the life and manners of mid-18th Cen-

tury London . . . Some critics, writers, and teachers of stature testified at the trial that the book has merit, and the testimony as a whole showed reasonable differences of opinion as to its value. It does not warrant suppression . . ." (our emphasis).

It is true that the Illinois Supreme Court in *People v. Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) wrote an opinion upholding contentions similar to those of the petitioners. In that case, the majority opinion (Schaefer concurred in the result) noted that it had, in an earlier opinion in the same case, rejected the defendant's arguments that the *Roth* case, struck down the "balancing test" which was ruling case law in *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E. 2d 585. The *Civil Liberties* case held at page 498; that:

"the obscene portions of the material must be balanced against its affirmative values to determine which predominates. . . ."

Following the *Jacobellis* decision, the Illinois Supreme Court reversed its previous ruling, giving as its sole reason, at page 498:

"It is apparent from the opinions of a majority of the court in *Jacobellis* that the 'balancing test' rule of *American Civil Liberties Union* is no longer a constitutionally acceptable method of determining whether material is obscene, and it is there made clear that material having any social importance is constitutionally protected."

The Illinois Court was led into accepting a rule of law it would not otherwise have adopted, at page 498:

“ . . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes . . . ”

Mr. Lenny Bruce did not fare as well with his arguments in *Bruce v. New York* (unreported, Dec. 1964). In that criminal action in New York City he was found guilty of using obscene words in his nightclub act. On a petition for certiorari, this Court refused to consider his case in June 1965.

If the Illinois Supreme Court knew then (Nov. 1964), what it knows now (June 1965), the Bruce matter undoubtedly would have been decided differently. The strength of *People v. Bruce* (*supra*), as a precedent in Illinois is questionable.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amicus Curiae.

APPENDIX "A".

The Housewife's Handbook on Selective Promiscuity.

By Rey Anthony (240 pages, in two parts). Seventh printing, c1962, LC 62-21130. Documentary Books, Inc., 110 West 40th Street, New York 18, N.Y.

INTRODUCTION

By Albert Ellis, Ph. D., New York City, September 15, 1960.

Dr. Albert Ellis states: "I have no hesitation in stating that Mrs. Anthony's Handbook is one of the most honest, courageous, valuable books on sex that I have ever read." (p. 7) He compares her writing to Mrs. Hilda O'Hare, publisher of the now-defunct scientific periodical, the International Journal of Sexology, giving her own views, in terms of personal experience, "on vaginal versus clitoral orgasm." (p. 7). Drs. Mary Calderone, Sophia J. Kleegman, and Lena Levine, among others, have "consistently stated, at meetings, of the American Association of Marriage Counselors, the Society for Scientific Study of Sex, and other professional groups, that the truth about female orgasm will never be fully known until women themselves give us their own detailed accounts and studies of what happens in their minds and bodies when they are engaged in sexual relations." (p. 7). "I find that the Handbook makes a distinctly valuable contribution to sexual knowledge." (p. 8). "More power to Mrs. Anthony—and a copy of her book to many of her (and my) professional colleagues!" (p. 9). "My own Art and Science of Love, may prove quite useful to millions of young people who have much to learn about sexual technique." (p. 9).

PREFACE BY THE AUTHOR'S DAUGHTER

By Tannette Savelle (age 19), Tucson, Arizona, August 1, 1960.

"This book was not written for professional people. It was written for people like mechanics, beauty parlor operators, carpenters, and housewives . . . because our laws are not in accord with our customs, we are a nation of sex offenders. We need laws that are more in keeping with the times we live in . . . I hope this book may enrich your life, as knowing my mother has enriched mine. During the time she wrote this book, I have come to know, understand, and admire her even more than I did before." (p. 11).

AUTHOR'S FRIENDS

Bill Patterson
Thorndyke Anthony, 3rd husband
Peter Landis
Jon and Vivian Merrick
Dr. Carl Adler
Ruth
Clint Jameson
Bill Canella, 1st husband
Sage, stepfather
Larry and Lorna Scott
Randall "Rock" Brown, 2nd husband
J. C. Smith, neighbor
Eric Summers, homosexual
Dan Jacobs
Laura Baxter, negro
Bill and Bobbie Sanford
Freddie Forman, lesbian
Donald James

Bill Iverson
Floyd Stewart
Al Sanislawski

Daughters

Tanette
Niki-Sue
Shari
Jana Kae

ABOUT THE AUTHOR.

By Rey Anthony, Tucson, Arizona, August 1, 1960.

Rey Anthony was born in a small town of east Texas, thirty-seven years ago. She finished high school at San Marcos Academy at fourteen, the youngest person to ever graduate from there. She attended the University of Houston for three years, majoring in mathematics, and interested in the social sciences (anthropology, psychology, and sociology.) She married the first time at age 17, and has been married and divorced three times in all. "I could be the woman next door to you, in a middle-class three-bedroom house." (p. 14) She is a P.T.A. member, operates a publishing and printing house, member of a national business woman's organization. "It is not for my own protection that I have chosen not to use my own name, but for the protection of my friends . . . the names have been changed to protect those who may be, or may seem to be, guilty in terms of current laws and/or moral codes." (p. 14) "Legality does not sanctify sex—any more than illegality makes sex filthy. . . . What may appear to be exceedingly promiscuous to one person might be the highly discriminating and therefore selective act of another person. . . .

Therefore, in the title of this book I have included the paradoxical concept of 'Selective promiscuity.'" (p. 15)
Rey Anthony is the mother of five daughters.

PART 1 . . . Experiences. (p. 19)

Age 3 . . . Dallas (1926)

The author wants to know where babies come from . . . her mother says she will tell her when she is older. The kids in the neighborhood had a contest to see who could produce the most awful smell. . . . "The most disgusting thing I had ever smelled was my pussy. . . . When I peed my mother would say, 'Wipe yourself.' I wiped my fingers across my pussy and returned to the . . . We all produced our smells and I won. . . . There was a rumor among the kids that boys didn't have pussies . . . one afternoon a boy showed me his peter . . . we wee-weed on the floor of my playhouse. . . . My mother yanked the door of the playhouse open. . . . She hit me over and over." (p. 20)

Age 5 . . . Dallas (1928)

"My father died. I asked my mother why it couldn't have been her. I loved Daddy best." (p. 21)

Age 7 . . . Houston (1930)

"My grandfather pawed my pussy. Because of my great disgust for his ugly face, with the tobacco juice stringing from the corners of his mouth, I didn't look often. . . . It's not easy to stand with your legs apart, as though straddling an unseen object, so that an old man can explore your privates. . . . His searching fingers found the tiny opening and he managed to push one of them into it . . . with his other hand he was feeling the undeveloped titlets. . . . My grandmother would not

believe me when I told her about his feeling me. She said he was a man of God. 'He is a Baptist Minister. It is sinful of you to tell all those awful lies about this good man.'" (p. 22)

Age 8 . . . Houston (1931)

"Marjorie's mother worked. She was gone all day . . . Marjorie's brother, Bud had a cute little peter. It was a little larger around than a pencil. (p. 22) Bud liked our pussies, and we licked and sucked on his peter." (p. 23)

Age 9 . . . Houston (1932)

Pages 24 to 25 describe her technique of masturbating in the bathtub. "When I took a bath, I slid up and down in the bathtub on my back. Once, when the water was running, it splashed on my pussy. It felt so nice I kept on doing it . . . and reached such a peak, that it was almost unbearable, and suddenly my hole just jerked and jerked. . . . (p. 24) Running the water all over the pussy felt good, but running it on the little bump produced the feeling that finally caused the exciting and wonderful jerking. I got mamma's cold cream, and rubbed it on the bump. I could better control myself this way." (p. 25)

Age 10 . . . East Texas (1933)

"My cousin Sydney showed me how to fuck. I felt as if I were going to pee. I told him, and he said, 'Go ahead.'" (p. 26)

Age 13 . . . San Marcos (1936)

At the San Marcos Baptist Academy, the author's roommate Ruth, knew a good deal about life. "She had

already fucked, she said . . . in cars, and in swings, and on the ground sometimes. . . ." (p. 29) Pages 29 to 31 describe the author as she continues her practice of masturbating in the bathtub. "I continued playing with myself in the bathtub. . . . I also played with myself in bed. . . . I used cold cream to lubricate the little bump. . . . I was told that some of the girls played with one another. . . . I never got to know one well enough to have such an affair. . . . Obviously no one else could do this to my body as well as I could do it to myself." (p. 31) She is exposed to pornography at the Academy. She got her first accurate information about sexual intercourse from "The girl of the Golden West." (p. 32)

Age 14 . . . San Marcos (1937)

Pages 32 to 34 describe sex discussions by the house mother of San Marcos Academy. "The house mother explained in plain and simple terms, with a certain loveliness added, about sexual intercourse." (p. 32) "The boys were said to have sex with the cows that were kept for milking purposes. If caught, a boy would be expelled for this. None were caught." (p. 35)

Age 15 . . . Houston (1938)

"I was shocked at girls who let boys take sexual liberties. . . . The girl who lived behind us . . . allowed the whole winning football team of Jeff Davis High School to lay her on the football field. . . . I asked her, 'Wasn't it sloppy?' 'Oh, not so sloppy; I wiped off in between times.'". . . The author says she wants to be a virgin when she marries. . . . "In spite of all my exploring and the fact that my cousin had had his peter in my pussy—I mean penis in my vagina—I still thought of

myself as a virgin. (p. 38) One of my best girl friends let her boy friend play with her titties. Breasts, that is. . . . My girl friend, after over a year of this fascinating play, still had small breasts and they didn't sag. . . . I went with one boy who was kissing me and had put his tongue in my mouth. . . . He put his hand on my stomach and moved it lower and lower . . . with all my clothes on and without consciously intending it to happen. I reached climax." (p. 40)

Age 16 . . . Houston (1939)

The author meets a young boy, Clint Jameson. "We spent literally hours kissing each other. . . . Pages 42 to 47 describe this affair in detail. "There were times when I would masturbate him with my hands. Other times he would kiss and suck on my clitoris. Now I put his penis in my mouth . . . even when I menstruated he kissed my genitals, and caressed, and sucked. . . . When we had intercourse we always used contraceptives." (p. 46)

Age 17 . . . Houston (1940)

Clint enlists in the Navy and came home on leave. . . . "He put his penis in my vagina and promised not to reach climax without first putting on a rubber. I couldn't face pregnancy alone." (P. 47.) He betrays her and fearing pregnancy after her menstrual period is a week late, she sees the family doctor. "Dr. Marsh examined me and it hurt. He mashed inside me and pulled and pushed. . . . I think you will menstruate in a couple of hours" he said. (P. 49.) She tells Clint she is through with him.

Age 17 . . . Houston (1940)

On reaching simultaneous climax with a man she says, "I had never wanted to have a climax at the same time he did. . . . When we were having intercourse the sensations were pleasant, and I liked paying total attention to him and making him enjoy the climax he reached. . . . My girl friend Ruth told me, 'girls who jacked off before they started getting screwed sometimes didn't come from getting screwed. It seemed that they got to liking coming from jacking off and then weren't normal.'" (P. 51.)

Age 17 . . . Houston (1940)

She meets Bill Canella. Pages 51 to 53 describe her affair with Bill. "He kissed all of my body in the next few weeks and I kissed all of his. . . . He could make me reach climax by stroking the clitoris gently and kissing the nipple of one breast. . . . Bill could drape his long body around mine and have his penis inserted in my vagina at the same time." (P. 52.) They were married in November, 1941, and move in with her mother and her husband, Sage.

Age 18 . . . Houston (1941)

Her first daughter, Tanette, is born. Five days later she and Bill decide to have sex. "Tanette was lying in her bed, right by my bed. . . . When Tanette would squirm I had trouble keeping my mind on reaching a climax. . . . It was my first really unpleasant sexual experience. . . . Ruth's baby, Dana, "was ten months old when she was observed putting her hand inside her diaper and looking pleased. When the diaper was removed it could be seen that she was rubbing or stroking her clitoris. She was quite happy doing it." (P. 60.)

Age 19 . . . Houston (1942)

When the author's baby is six months old, she is pregnant again. . . . She separates from her husband . . . and has an abortion. (P. 64.) "The abortion was a horrible experience, not because it was an abortion, but the way it had been done." (P. 66.) Page 66 describes Rey having climax in the front seat of Bill's car after he returns to see her a week after she has had the abortion. "He fondled my 'Mons Veneris'. He stroked the sensitive skin at the top of my thighs, just on the outer edge of the large lips. He put his finger in my vagina and moved it in and out . . . sitting in the car I reached climax." (P. 66.) On the morning she is to go to court to get her divorce, Bill arrives and they go to bed. "I know we thought we were the only two people in the world ever to be getting a divorce and still having sex with each other." (P. 67.)

Age 20 . . . Houston (1943)

Rey gets a job at a shipyard. She meets Marie, a whore. "She was charming. She was one of the most completely gracious people I have ever known. 'When you have sex, my dear, do not do it in the back seat of cars. Do make sure you have the basic conveniences of life, such as a bed, hot running water, and towels,' she said." (p. 69)

Rey's foreman propositions her and she refuses him. The next afternoon he fires her. She thought, "You son of-a-bitch! Can't you get a woman in bed with you any other way?" (p. 70) Later she is rehired at the same shipyard, and in a medical examination she is told she has syphilis. She goes to another doctor who tells her it is "monilia albicans". (p. 73) He tells her it is

contagious like any other venereal disease, and tells her it serves her right for fooling around. She realizes she had first contracted this infection about four months after she began having sex with Bill Canella. She is finally cured of the disease by a woman doctor.

For several months she went without sexual relations with a man. "I had masturbated some, but not much." (p. 75) Wanting sexual relations with a man, she goes to bed "with a little fellow who didn't know I was there. He kissed me a couple of times and climbed onto my body. He just joggled and joggled, had an orgasm, and fell off. 'Go take a leak,' he said." (p. 75) She has much the same experience with another man. "The nearest anyone came to knowing I was a person and could feel thing too, was a fellow who asked, 'Diya come?' " (p. 75) One man who made her reach climax was unhappily married, "We had successful sexual relations but he was much too involved with his home life to get very involved with me." (p. 76) She goes to a tourist cabin with these various men. Pages 76 to 82 describe her affair with Larry Scott, a married man. "I showed him how he could lie beside me and insert his penis in my vagina. Then he could stroke the clitoris and manipulate the breasts as Bill had. . . . He was a really wonderful lover in no time at all." (p. 78) "His penis was smaller than Bill's and Clint's had been. So had the other men's been smaller . . . I thought: how unique that the first two penises I should come across should be larger than average." (p. 79) Larry's wife, Lorna, finds Rey's billfold on the front seat of his car. She goes to Rey's apartment and believes Rey when she denies she was with Larry. They become good friends, and Rey continues her affair with Larry. Lorna tells Rey how much their

sexual relations had improved. "She even confided to me about the new way they had intercourse—from the side, as she put it." (p. 82) Larry wanted to leave Lorna and his two sons to marry Rey, but he cared for Rey more than she cared for him. They finally stop seeing each other. "I had grown to care for another man who didn't care for me." (p. 82) "I felt the pain of loving this man and having him not care for me at all." During intercourse he said, "Move your tail." He snorts in disgust when she says she doesn't know how. (p. 82)

She meets Randall Brown, or Rock as she calls him, on a street corner while waiting for a bus. He walks her home, and they talk until five in the morning. He was in the Navy, and a likeable person.

Rey's stepfather, Sage, propositions her one day when her mother is out of town, but Rey refuses him. (p. 84)

Age 21 . . . Houston (1944)

Rey writes to Rock in the Navy. He asks her to marry him and she accepts. She writes him she has had sex before she married and was divorced, and "would never be true to any man . . . I wrote to him that not only did I do things like that, but I didn't think they were bad." (p. 85) "Mamma made some pictures of me in our back yard—with some black panties and a black bra on. They managed to look ladylike and sexy at the same time." (p. 85) She sends the pictures to Rock. When he comes home on leave, she gets a hotel room, but he tells her he wants to wait to have sex until after they are married. "The longer he stayed the more he decided it wouldn't be necessary to wait . . . He kissed me a couple of times, climbed on me, joggled a few minutes, and reached climax . . . he said it was good,

and went to sleep quickly, and I lay there wondering what was so good about it." (p. 86) They continue to have sex whenever he comes in on leave. She tells him she wants to have her "clitoris rubbed gently." Rock says it's not normal. "It makes me feel like I'm not a real man if I can't use my peter," he says. "You can use it, but for me, use your hand," Rey says. (p. 87)

Age 22 . . . San Francisco/Houston (1945)

Rey marries Rock, and after the first couple of weeks all of the novelty was gone. They argued, and it didn't take Rey long to realize she was getting sexual excitement out of the anger. They agreed not to have sex after they argued so they wouldn't get accustomed to a "pattern of messy fighting, making up, and screwing." (p. 88) Rey is expecting a baby.

Rock tells her when he had elephantiasis, the doctor gave him prostate massages. "The doctor would insert a finger in his rectum and move it back and forth, and though this would hurt unbearably, he would reach an orgasm." (p. 89) He felt this treatment had something to do with his lack of sexual desire.

They go to visit Rey's mother. Tanette asks what fucking is, and Rey tells her it is sexual intercourse. Tanette's grandmother finds her in a back bedroom with a little boy looking at each other's genitals, and she shouts at Tanette not to do anything like that again. (p. 91)

Bill Canella pays Rey a visit. He has remarried, and his wife is pregnant for a second time. He says he knows it can't be his child.

As Rock didn't want sex, when Rey went to bed she thought sex pictures. "I had dogs having sex with women, men having sex with horses, two men having

sex with me, some woman and man having sex and I would be one of them. (P. 94.) When Rock wasn't home I would sometimes go to bed and masturbate. But when he was home in bed with me I would make the pictures and have an orgasm." (P. 94.)

Rey takes castor oil and ten grains of quinine to induce labor of the expected baby. She insists Rock have sex with her when the labor pains start. Rock is reluctant but finally agrees. Page 96 describes them in bed. "Rock gently manipulated my clitoris. I reached a wonderful orgasm. . . . While I masturbated Rock, the pleasant sensations ebbed away and the pain of the labor contractions flowed in around me again." Her second daughter, Niki-Sue is born, and a few days later Bill Canella's baby is born. "It looks so much like him that it was unmistakably his child. "The woman always knows it's her child . . . but the man can only wait and hope—and sometimes never knows for sure." (P. 98.)

After Niki-Sue's birth, they move into a new house. Their neighbor, J. C. Smith, has an extraordinary "tool," Rock said he had an eleven inch penis. "Maybe it was even twelve inches; Rock had seen it when it was semi-erect, semi-flaccid, and wasn't at its best. Rock laughed and said that some fellows' peters never got any bigger even when they got hard." (P. 99.)

Rey is tired and ill, so she goes to a doctor telling him she has a sex problem. He advises her to, "masturbate, get another man, but take care of it. (P. 102.) I told him about the pictures—and the mental masturbation. That takes ability, he said. (P. 102.) Rey's sex problem still bothering her, she talks to Rock about it, telling him she prefers sex with him two or three times

a week instead of having to masturbate. Her mother and Rock convince her to go to another doctor. She does, and this doctor says, "There is just one thing I want to know: What are you doing here? Send your husband and your mother in. *They* need help." (P. 103.)

Age 23 . . . Houston (1946)

Rey goes to a motel with Larry Scott. Page 104 describes intercourse between them. "Once he got it (penis) inserted and said, 'Be still.' But even though I never moved once, he reached a climax right then." (P. 104.) She tells Rock about her sex with Larry. It upsets him, so she doesn't tell him about it again, and continues having sex with Larry. . . . Rey uses a diaphragm "with both Larry and Rock anytime I had intercourse." (P. 106.) She fails to one time with Rock and gets pregnant. . . . Their neighbor suggests a doctor that Rey can go to for an abortion. "He's the one that's been doing my mother's abortions for years." (P. 107.) Rey is really not sure if the baby is Rock's or Larry's child. She continues having sex with Larry. "Now the people at tourist cabins and motels do know what a man and woman are doing when they check in, remain a short while, and then leave. I wondered what they thought of a man checking in with a woman as pregnant as I was." (P. 108.)

When the baby (Shari) is born, it looks like Larry, and Rock says, "She's no Brown." Rey thinks, "What have I done? I am a bitch." (P. 109.)

Rock and I decided that he should have a vasectomy, so there would be no more pregnancies. She discontinues her relationship with Larry. Pages 112 to 114 describe Rey's ideas on having simultaneous climax

with Rock. "The precision of synchronously adjusting bodies to each other makes impossible the abandonment of the individual to the experience. . . . Simultaneous climax turned out to be another one of those fairy tales for the ignorant." (P. 113.)

Rey's friend Ruth, who was married with two children, went to a motel with a man who she worked with. "He sucked on her clitoris. And she had an orgasm for the first time." (P. 115.)

Rey and Rock move to North Carolina. They give up normal intercourse by mutual consent. She tells him how nice masturbating with a coke bottle can be. "I first heard of the suitability of coke bottles for female masturbation in the midst of a theological discussion with a Methodist Minister." (P. 117.)

Page 117 describes Rock using masturbation on Rey. "Rock put his thumb in my vagina, and by turning his hand so that part of it touched the clitoris, caused me to reach a climax by using a highly successful round-and-round and in-and-out movement." (P. 117.) They move back to Texas because they are so unhappy. Rock gets a job driving a taxi. They get along so poorly that Tanette prefers to live with her grandmother.

Age 27 . . . Houston (1950)

Rock goes to sea on a merchant ship. He tells Rey he has had sex with another woman, and describes how they do it with her on top. Rey wants to try it. "We did and it felt good." (P. 118.)

Rock runs into Eric Summers, who propositions him. Rock said he thought he would try it because Rey had told him to try different things sexually. "He said Eric had knelt on the floor by the bed and sucked on his penis until he—Rock—reached a climax." (P. 119.)

Age 28 . . . Houston (1951)

Rock has gone to sea, and Rey meets Dan Jacobs. "Dan said he thought sex should be performed between friends. He said he would only go to bed with a friend." (P. 119.) Pages 119 to 125 describe their sexual relationship. "I gave him information about how I liked the stimulation of the clitoris, and ultimately liked climax in that manner. . . . I was able to reach orgasms that were of beautiful intensity." (P. 120.) Dan doesn't like using his finger on her, he wants her to try "normal" intercourse. Rey liked scheduled sex, while Dan considered this "proposed scheduling about the most ridiculous thing he had ever come across . . . we had to have sex only without previous thought on the subject or it lost the beauty of spontaneousness. . . . Dan decided I was too much wear and tear on his nerves, and gave me up." (P. 123.)

Rock comes home. They move to a new apartment, and he gets a job driving a taxi. Rey becomes good friends with her negro neighbor, Laura Baxter. Laura gets annoyed with Rey because of her progressive ideas on teaching her daughters about sexual intercourse. Rey has told Tanette that pussycatting means intercourse-ing. Rey tells Laura, "I have no objection to your son's teaching my daughters about sexual intercourse—surely you have no objection when my daughters teach him some of the more accepted language on the subject." (P. 127.)

Rey moves to Dallas, taking Niki-Sue and Shari with her. She sells the Reader's Digest and makes good money. She meets Bill and Bobbie Sanford, who were hep, "cool cats." They teach her a whole new vocabulary. "I never found out what a penis was, but the female

sexual anatomy was summed up by the word, box." (P. 130.) She goes to a motel with Bill. "He was the craziest lover ever . . . he licked and sucked on my breasts, he nibbled at my clitoris. He sucked at the vaginal opening. The sensations were wild and wonderful, and I loved every one of them." (P. 131.) Page 131 describes them having intercourse.

Age 29 . . . Houston/Austin/San Antonio (1952)

Rock helps her in selling Reader's Digest, They hire a couple of people in San Antonio to help. Rey wants a divorce. She calls a lawyer. He tells her she should have no trouble getting one, telling her of a case where a woman wanted to have anal intercourse. "The judge saw her in his chambers, so she didn't have to bring out her sexual preference in court, and gave her a divorce." (P. 133.)

Age 30 . . . Houston (1953)

Rey goes back to Houston, and Rock goes to Fort Worth. Page 134 describes Rey in a motel having intercourse with Bill Sanford.

Age 30 . . . Houston/Phoenix (1953)

They move to Phoenix and Rock and Rey end their marriage. Rey says, "Rock you have tried to own my body. You couldn't do that—I own it . . . then you thought you could own me—and I just can't be owned. There's such a thing as dignity, and I have overlooked mine too long. You're leaving." (P. 136.) She divorces Rock, and continues her affair with Bill Sanford. Bill tells Rey his wife uses essence of peppermint for douching. Rey tries it, and Bill says, "You see, that makes your box very tasty." (P. 137.)

She meets Freddie Forman, a lesbian, where she works. Page 139 describes her lesbian affair with Freddie. "The kids would go in and go to bed. Freddie and I would neck. . . . She felt my breasts, and my vulva, but she was not very adept at this. I could compare her to a fumbling sixteen year old boy, easily. . . . My brief encounter with homosexuality didn't last long." (P. 139.) Rey works for Jon and Vivian Merrick. She continues her affair with Bill Sanford. "Bill introduced me to an exciting way to reach an orgasm. He would lick on my clitoris—suck on it—and put a finger into my vagina. . . . One time I was immersed in the sensations—my legs were apart and he was sucking on my clitoris—and he began to move the finger that he had had in my vagina . . . he approached the anus and began pushing his finger into it . . . when I reached climax this time it was even more intense. . . ." (P. 141.)

Age 31 . . . Phoenix (1954)

One month before her divorce is final, she meets Thorndyke Anthony. He offers her marriage. "I would have preferred simply living with Thorny instead of getting married this third time. However, marriage seemed to be the most intelligent thing to do when I considered the attitudes of the society I lived in." (P. 145.)

Thorny dislikes massaging her clitoris to have her reach climax. He asks her to try "normal" intercourse.

Bill Sanford visits her, and they "had a very nice sexual experience. He was still a competent lover." (P. 148.)

Thorny talks her into having normal intercourse, "He inserted his penis in my vagina. . . . I thought sex pictures. And I reached climax." (P. 149.)

Bill Sanford visits her again, and they have sex.

Rey finds she is pregnant, but she is not sure who the father is. She tells Thorny, and he says, "Any child you have will be our child." (P. 150.) Page 151 describes Rey reaching climax by wrapping her legs around Thorny's leg, and undulating her body until she reaches climax.

Tanette, 13 years old, has met a "charming fellow" of 17. He moves in to their apartment, and Rey approves of their, "pseudo-honeymoon-before-marriage relationship." (P. 153.) Tanette tires of him, and he leaves in dejection. His name was Donald James.

Thorny tells Rey she shouldn't make sex so important. Rey thinks: "I can always masturbate, I can cope with the situation myself." (P. 155.) They have sex after three weeks, and it was such an unpleasant experience that Rey felt, "sex is awful." (P. 156.)

Rick, a friend of Thorny, tells Rey and her daughters how his wife died trying to abort a baby of another man she had known. Rey tells Tanette, Niki-Sue, and Shari, "only with proper medical supervision could abortion ever be safe, and then it would be as safe as any other surgical operation." (P. 157.)

Age 32 . . . Houston/Tucson (1955)

Rey takes her daughters to Houston when she is eight months pregnant. She lets them watch while the doctor examines her. She wants them to be able to watch when she has the baby, but the doctor tells her this is not possible. Pages 161 to 162 describe the birth of Jana Kae, Rey's fourth daughter. There was a possibility Thorny was the father due to blood type. They all return to Tucson, but Rey knows the marriage won't succeed.

Age 33 . . . Tucson (1956)

Rey meets Bill Iverson. Pages 165 to 168 describe perversion and sexual intercourse between them. "Then he pulled my body to the edge of the bed. He sat on the floor and put his face between my legs—I felt his tongue on my clitoris. (Cunnilingus, p. 167.) Our intercourse was a lovely aftermath for me. . . . Bill and I made a very nice sexual relationship four ourselves." (P. 168.)

Age 34 . . . Tucson (1957)

Thorny goes away to school. Bill Iverson moves in with Rey and her four daughters. Pages 171 to 172 describe sex relations between Rey and Bill. "When I made love to Bill I kissed his body, fondled his testicles, kissed and sucked on his penis." (P. 171.) "When we had sex Bill masturbated me to a climax with his finger or his tongue." (P. 171.) Bill continues to have sex with other women with Rey's consent.

Pages 174 to 182 give Rey's theory on marriage. "I tend to be highly monogamous—with one person at a time—but not forever." (P. 180.)

Bill moves out when Rey leaves for Houston to meet Thorny. They have sexual intercourse once. After four months of sexual abstinence I suggested that we have sex. Thorny tells her she places too much importance on sex. "If you would spend more time on the more important things in life, we might be able to have sex once in a while." (P. 184.)

Tanette brings her boy friend Bill Patterson to the house, and he moves in. "We had our pseudo-honeymoon-before-marriage situation again." (P. 184.)

Not liking abstinence from sex relations, Rey goes to see Bill Iverson and has sex with him. She talks

to Thorny about trying to resume sex relations with him. He said he wasn't going to ever, and tells Rey he wants her to be a respectable mother to Jana. Rey says, "I will have sex. I will be in bed with a man." He accuses her of being promiscuous. She says, "If that's being promiscuous, then that's what I want to be." (P. 186.)

Tanette is sixteen now. She meets Floyd Stewart, who is 24 years old. She ends her relationship with Bill Patterson, and continues seeing Floyd.

Thorny leaves Rey after they divide their assets and liabilities. Months pass, and she builds up a printing business. "I wasn't involved in a goofed-up marital relation sans sexual sensations. I masturbated if I wanted to." (P. 189.)

Rock visits Rey. He visits with her daughters, and Rey goes to bed. "I woke up with Rock fondling my breasts. Twelve months of nearly complete sexual abstinence resulted in an immediate response on my part. . . . I had had five climaxes caused by someone else in the past year, and these five times had definitely not left me satiated. As Tanette, or anyone else who knew the facts would have put it, I was hard up. 'Just a minute,' I said. After all, Jana was lying on the other side of the bed I was on. I led him by the hand into the bedroom where he was staying that night. I got on the bed and we didn't say a word. We just made violent and passionate love. He did all the things that he knew I liked. It was extremely nice." (P. 190.) Rey asks him how sex is with his present wife, Stella, and he tells her "It's all right." (P. 190.)

Rey meets Dr. Carl Adler. Pages 188 to 210 describe their sexual relationship. "I had sex on several occasions

with another very nice man I knew, Al Sanislawski." (P. 201.)

Page 207 describes her feelings when Dr. Adler made love to her. "When he licked my clitoris, with fingers inserted in my vagina and anus, and I reached a climax, I would slide off the foot of the bed. . . . For me Dr. Adler was the man I had the most intense feeling for, so sexual relations with Rock and Al fell into the category of either 'gooder' or 'goodest.' Dr. Adler said our relations were the result of good clean lust." (P. 211.)

Tanette talks Rey into writing the book. Her daughters collate the book and put it between covers.

PART TWO. . . . Miscellaneous concepts.

A Penis by any other name . . .

"In short, one way sex is made 'filthy' as it is today, is by sheer neglect on the part of parents to provide a suitable vocabulary for things children must confront all through their lives . . . anus, vagina, penis, testicles, breasts . . . along with ears, eyes, nose, throat, legs, and brains." (P. 216.) "So long as we persist in not teaching our children authentic language at an age when they need it in order to integrate bodies and body actions into their everyday life, that long will we have 'obscenity.'" (P. 220.)

Obscenity is where you find it.

"There does not exist *anything* that is intrinsically obscene. For an individual to feel that an object or action is obscene, he must manufacture the idea of obscenity and apply it to the object of action." (P. 222.) "In some societies, women are completely unrestricted about sex and sexual matters, and the men are the

same way. Obscenity takes over when possessiveness, jealousy, and hate take precedence over the more natural human emotions of friendliness and mutual respect. . . . For if you can accept a thing *for what it is* it ceases to be obscenity." (P. 222.)

Sexing for fun and profit.

"Finally, the usefulness of sexciting and sexotic pictures—the fantasizing—cannot be stressed too greatly in allowing the female to reach a climax of a wonderful nature and with great intensity." (P. 224.) . . . "let us develop the ability to create in our own minds the loveliness that can be had with good clean lust. This can be fun, and can be profitable in terms of better health and happier relations with our friends and acquaintances. Our sex life is not so separate from our life in general. The one does influence the other." (P. 225.)

"Normal" intercourse.

In actual order of importance for love making to the woman, the penis which is not easily manipulated, would have to rank third among the masculine extremities. . . . The tongue is second best. . . . The fingers are the most capable extremities in making love to a woman. (P. 226.)

Abortion.

"We are in need of more realistic attitudes regarding abortion. . . . When a woman finds herself pregnant, and in circumstances which make it impossible (emotionally) for her to bear a child, the resultant attitude can be insanity." (P. 228.)

Sex in language and action.

"We regard all practices other than 'normal' intercourse (coitus) as 'unnatural.' . . . Just a few words

that no one would want applied to himself are: promiscuous, wanton, lewd, lascivious, sensual, passionate, carnal, and lustful." (P. 232.) "Things of the spirit are created in the image of our God. Things of the spirit are created in the image of God, and things of the flesh but reflect the spirit. Of all Godlike qualities we are endowed with, the sexual capacity is one of the finest. Our sexual appetites are not of the devil, but are rather physical expression of spiritual qualities. . . . When the consciousness controls the body and creates sexual sensations, it is realizing and experiencing a very worthwhile—and spiritual—activity." (P. 233) "One fascinating aspect of sex in action is the fact that counselors and doctors now give advice that, if carried out, results in disregarding the criminal code." (P. 234.)

What price rebellion?

"There are some methodologies that would adjust all men to the world around them. . . . Dr. Robert Lindner, in his 'Prescription for Rebellion,' says that the average psychiatrist tries to 'adjust' his patients to *placid acceptance of a maladjusted society!*" (P. 238.)

"The way out and up in regard to our sexual problems in this country is by way of communication and education. Though speaking openly on sexual matters is a little rebellious, let us hope that more and more of us can acquire the willingness to confront our sexual activities. Only when we do this will we come out of our communicational and conversational dark age on sex." (P. 240.)

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

**RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 385-393) is reported at 338 F. 2d 12. The opinion of the district court (R. 354-368) is reported at 224 F. Supp. 129.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1964 (R. 394-397). On November 27, 1964, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including January 5, 1965. The petition was

filed on January 4, 1965, and was granted on April 5, 1965 (R. 400). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the materials at issue are "obscene, lewd, lascivious, indecent, filthy or vile" within the meaning of 18 U.S.C. 1461.

2. Whether procedural defects affect the judgment.

STATUTE INVOLVED

18 U.S.C. 1461 provides, in pertinent part:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * * * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; * * *

* * * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or dis-

posing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

Having waived trial by jury (R. 2), petitioners were tried and convicted of violating 18 U.S.C. 1461. Petitioner Documentary Books, Inc., was convicted on six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" book (*The Housewife's Handbook on Selective Promiscuity*, hereinafter called *The Handbook*) and three counts of having caused the mailing of advertisements telling where the book could be obtained. Petitioner Liaison News Letter, Inc., was convicted on six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" pamphlet (*Liaison*, Vol. 1, No. 1) and three counts of having caused the mailing of advertisements telling where the pamphlet could be obtained. Petitioner Eros Magazine, Inc., was convicted of six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" magazine (*Eros*, Vol. 1, No. 4) and four counts of having caused the mailing of advertisements telling where the magazine could be obtained. Petitioner Ginzburg was convicted of all twenty-eight of the foregoing counts (R. 2-3, 345). Petitioner Eros Magazine, Inc., was fined a total of \$5,000, and each of the other corporate petitioners a total of \$4,500.

Petitioner Ginzburg was fined a total of \$28,000 (\$1,000 on each count) and sentenced to a total of five years' imprisonment. Three years of his sentence was based upon counts involving *The Handbook* and two years upon counts involving *Eros* (R. 4-5, 373-379). No prison sentence was imposed on counts involving *Liaison*.

In its direct case, the government introduced the allegedly offensive materials themselves and, in addition, offered testimony that unsuccessful efforts had been made to obtain for *Eros* the postmarks of Blue Ball, Pennsylvania, and Intercourse, Pennsylvania (R. 152-159), and that a postmark was obtained for all three publications at Middlesex, New Jersey (R. 159-162). The government also offered a witness who had been an employee of *Liaison*, who testified concerning the manner in which that publication had been written and compiled (R. 173-183). Petitioners offered various witnesses (a psychologist, a psychiatrist, a literary critic, an art critic, and a minister trained and experienced in clinical psychology) who testified that the three works do not appeal to prurient interest, have literary, artistic or scientific value, and do not go substantially beyond community standards of candor (R. 186-223, 227-241, 256-316). In addition, they offered testimony by the author of *The Handbook* as to its factual character, her purpose in writing it, and her own prior mailing of copies of it (R. 223-227). They also offered a number of books and magazines, including some admittedly obscene materials, for purposes of comparison (R. 196-198, 242-256). On rebuttal, the government offered three witnesses who testified con-

cerning the character of the materials in issue (R. 333-334).

The verdict of guilty was entered on June 14, 1963 (R. 2). On August 6, 1963, the court, at petitioners' request (R. 349), filed special findings of fact (R. 3, 351), and on November 21, 1963, the court filed an opinion denying petitioners' motion in arrest of judgment or for new trial (R. 354-368). With regard to the character of the three publications¹ the court's opinion described them as follows (R. 361-367):

LIAISON

Liaison is a newsletter or periodical folder type of publication consisting of commentary from various sources with a general editorial treatment. * * * The material covers the most perverse and offensive human behavior. While the treatment is largely superficial, it is presented entirely without restraint of any kind. * * * [I]t is entirely without literary merit. * * * If there is any socially redeeming value in this material it must come from what is advocated or from its entertainment value. There are jokes and rhymes which clearly go beyond contemporary community standards of humor, even in applying liberal night club standards. The remainder of the material is of the same nature and exceeds the standard in the same manner.

* * * * *

¹ It was stipulated that petitioners caused the mailing of the three works and of the advertisements pertaining to them with knowledge of the contents of the works and the advertisements (R. 148-150).

* * * *Liaison* is designated obviously and solely for the purpose of appealing to the prurient interest of an ordinary person. The only idea advocated is complete abandon of any restraint with regard to any form of sexual expression. This "idea" is nothing more than could be advocated by the most flagrant pornography * * *

EROS

Eros is a carefully contrived magazine or periodical type of publication with a hard cover and glossy paper. It is replete with photographs and includes reproductions of recognized works of art. Nevertheless, * * * the dominant appeal is to pruriency. The works of art * * * are merely a facade to disguise and protect the basic purpose and effect of the entire work. * * *

Although it is difficult to classify all of the articles in *Eros* into specific categories, there is a clearly defined arrangement to the material. To some, several articles might be considered innocuous, only slightly erotic and possibly not obscene in and of themselves. * * * This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. * * * [S]ince the work must be considered as a whole, material which might be innocuous alone partakes of the obscenity elsewhere in *Eros* and becomes part and parcel of the overall plan and intent of the work. * * *

* * * The items of possible merit and those items which might be considered innocuous are a mere disguise to avoid the law and in large measure enhance the pruriency of the entire work. The only overriding theme in *Eros* is

the advocacy of complete sexual expression of whatever sort and manner. * * *

* * * The articles called: "Frank Harris, His Life and Loves" including "My Life and Loves" by Frank Harris; "Bawdy Limericks" and the "Natural Superiority of Women as Erotocists" and "Black and White in Color" are such that standing alone, one has little difficulty in finding all of the requisite elements of obscenity. For example: "Bawdy Limericks" consists of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior. Also by way of example: the series of pictures, "Black and White in Color", constitutes a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination. * * *

* * * There is no notable distinction between the aforesaid, taking each one as a whole, and the admittedly obscene material which was in evidence for comparison purposes.

The impact of these articles and items is sufficient to permeate the entire volume of Eros. * * *

THE HANDBOOK

* * * This book is of a kind with * * * admittedly hardcore pornography. It is an explicit decription [sic] of a woman's sexual experiences from early childhood and thereafter throughout most of her life. It purports to be, and the authoress so stated under oath, a factual and highly accurate reporting of actual occurrences. * * * We doubt the accuracy of this book. It also easily meets the previously

mentioned tests of bizarre exaggeration, morbidity and offensiveness.

The Handbook's description of various sexual acts is astounding. As in the case of *Liaison*, no literary merit is ascribed to the book. Its sole claim to redeeming value is its alleged value as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. Any testimony to this effect is expressly disbelieved by this Court. * * *

The Handbook, standing bare of any socially redeeming value, is a patent offense to the most liberal morality. The descriptions leave nothing to the imagination, and in detail, in a clearly prurient manner offend, degrade and sicken anyone however healthy his mind was before exposure to this material. It is gross shock to the mind and chore to read. Pruriency and disgust coalesce here creating a perfect example of hardcore pornography.

In his findings, the judge concluded that each publication "treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader"; and "has not the slightest redeeming social, artistic or literary importance or value" (R. 352-353). As to *Eros* and *The Handbook*, the judge found that each "appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 352-353). As to *The Handbook* and *Liaison*, the judge concluded, in addition, that each "goes beyond customary limits of candor, exceeding contemporary standards in description and representa-

tion of the matter described therein"; and that each "is patently offensive on its face" (R. 352-353). As to *Liaison*, the judge found that it was "published for the purpose of appealing to the prurient interest of the average individual" and that it "primarily and as a whole is a shameful and morbid exploitation of sex" (R. 352). In conclusion, the court found that all three works "are devoid of theme or ideas" and "are all dirt for dirt's sake and dirt for money's sake" (R. 353).

The court of appeals affirmed (R. 385-397). After noting that "[w]e have read, examined and considered the publications involved in this appeal, * * * in the light of the record made in the trial court * * *" (R. 387), the court found, (1) as to *Eros*, "its basic material predominantly appeals to prurient interest; it is on its face offensive to present day national community standards, and it has no artistic or social value" (R. 389-390); (2) as to *The Handbook*, "[t]here is nothing of any social importance in [it]. It is patently offensive to current national community standards. Applying those standards to the average person its dominant theme as a whole appeals to prurient interest" (R. 390); and (3) as to *Liaison*, "[i]ts material openly offends current national community standards in much the same fashion as does *Eros*. Taken as a whole, its appeal is directed to the prurient interest of the average person in the national community. * * * There is no pretension that it has any social significance or literary merit" (R. 390-391). The court emphasized that these conclusions were "independently arrived at" (R. 393). Finally,

the court rejected six procedural errors which petitioners alleged as affecting their convictions (R. 391-393).²

ARGUMENT

Introduction and Summary

In *Roth v. United States*, 354 U.S. 476, 485, this Court held that "obscenity"—i.e., material dominantly prurient and offensive in light of community standards—"is not within the area of constitutionally protected speech or press." As the Court's opinion shows, this holding flowed principally from constitutional history, including evidence contemporaneous with the adoption of the First Amendment, demonstrating "the rejection of obscenity as utterly without redeeming social importance" and, hence, treating it as matter "outside the protection intended for speech and press." The constitutional protection "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired

² The six alleged errors were as follows: (1) that the trial court failed to make the requisite factual findings with regard to *Eros* and *Liaison*; (2) that the Special Findings of Fact under Rule 23(a) of the Federal Rules of Criminal Procedure were not filed promptly; (3) that the trial court improperly used evidence of criminal intent relevant only against *Eros Magazine, Inc.*, against all defendants; (4) that the testimony of government rebuttal witness Frignito was improper; (5) that the trial judge had improperly denied the motion to dismiss the indictment without having read the allegedly obscene publications in their entirety; and (6) that the trial court had erred in striking the affidavit and exhibits in support of the defense motion to dismiss the indictment. (R. 391-393.) Insofar as these allegations are raised in this Court, they are discussed at pp. 34-36, *infra*, and in footnote 6, p. 22-23, *infra*.

by the people"; the Court found that obscenity, unrelated to such an exposition of ideas, had never been thought to be within its scope. Thus, "this Court has always assumed that obscenity is not protected by the freedoms of speech and press." The Court's view was, moreover, buttressed by "the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (354 U.S. at 481, 483-485.)

In the present case, petitioners do not challenge the holding of *Roth* that some utterances may thus be deemed "obscene" and therefore outside the speech and press protections of the First Amendment. They also accept the general proposition that the test of obscenity is whether the publication is dominantly composed of prurient and offensive material and is without redeeming social importance. Petitioners argue, however, that all three publications involved in this case—*Liaison*, *The Handbook* and *Eros*—do, indeed, have redeeming importance and that, in addition, the trial court and the court of appeals disregarded both the evidence and the particular legal standards appropriate in judging the value, pruriency, and offensiveness of these materials (Pet. Br. 28-56). Petitioners also urge certain procedural errors as affecting the validity of their convictions (*id.* at 57-66).

Two briefs filed with the Court *amicus curiae* urge, in addition, that *Roth* be overruled. The brief of the Authors League of America, Inc., argues (p. 5) that a criminal obscenity statute may not be applied, as it was both in *Roth* and in this case, "where a book or

other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the right of privacy of individual citizens”; the brief of the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania urges (p. 4) that “[a]ll utterances”—including obscenity—“are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger [apparently deemed lacking by this *amicus* in cases of obscene publications] that they will bring about a substantive evil to society unless restrained.”

We think it appropriate to respond, albeit briefly in light of the full consideration recently given to the question by the Court in *Roth*, to the suggestions of the *amici* that *Roth v. United States* be overruled and the federal mail-obscenity statute (18 U.S.C. 1461) be held unconstitutional even as applied to concededly obscene material with no redeeming importance. We do so in the first section of this brief. We then show that both courts below unquestionably applied the proper legal standards laid down by this Court in *Roth* in judging whether the materials in this case were obscene. We submit further that the conclusions of the courts below that the particular materials here involved were dominantly prurient and offensive and without redeeming importance were reasonable in light of the character of these materials. If, upon an independent view of the materials, the Court finds that these materials indeed had no redeeming features placing them within the protection of the First Amendment, we submit that the findings of obscenity should be affirmed. Finally, we address ourselves to

the procedural errors urged by petitioners and submit that they present no ground for setting aside the convictions.

I

THERE IS NO OCCASION TO REEXAMINE THE HOLDING OF *ROTH V. UNITED STATES* THAT THERE IS A CLASS OF OBSCENE UTTERANCES, WITHOUT REDEEMING IMPORTANCE OR SOCIAL VALUE, WHICH IS OUTSIDE THE PROTECTIONS OF THE FIRST AMENDMENT

Roth held that "obscenity is not within the area of constitutionally protected speech or press" (354 U.S. at 485). It based this judgment upon a consensus—reflected in the laws of all the States, in federal statutes since the middle of the last century, in the uniform decisions of this Court and in the understanding of the Framers—that a class of filthy or lewd utterances exists which, because of their offensiveness and lack of social importance, may and should be regulated consistently with constitutional guarantees of freedom of speech and press. In the view of this consensus such utterances play no role in the interchange of ideas toward which the constitutional protections were directed; in light of the purposes of the First Amendment they are "utterly without redeeming social importance" and hence outside the scope of that Amendment in light of the strong social policies favoring their prohibition. *Roth* declined to overturn this established uniform doctrine and practice.

There is, in our view, no occasion to reexamine this holding. We believe that there continues to be a solid basis for the decision in *Roth* that obscene utterances

exist which, while they take the *form* of protected speech, bear no relationship, or so little relationship, to the flow and exchange of ideas which the Constitution safeguards that recognition may and should be given to a long-standing practice excluding them from constitutional protection in light of their offensive quality. In *Roth*, where the question of constitutionality was squarely raised by the parties, the United States lodged with the Court numerous examples of such material; similar material was placed in the record of this case by petitioners for purposes of comparison (R. 196-198), petitioners conceding that it was within the statute. Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material, we submit, is solely for the purpose of arousing lust; it cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. In addition, as this Court has held (*United States v. Limehouse*, 285 U.S. 424), the concept of obscenity under 18 U.S.C. 1461 similarly applies to vulgar and filthy, rather than purely erotic, sexual material—and perhaps

to filthy scatological material as well³—used solely to arouse or offend and with no other purpose or context. If no rational basis existed for prohibiting these materials the First Amendment might protect them, despite their total lack of redeeming importance, because of the dangers inherent in the difficult process of distinguishing these worthless materials from protected speech. We submit, however, that so long as a substantial social purpose may reasonably be deemed served by suppressing these materials, *Roth* correctly held that, lacking redeeming importance, they are not constitutionally privileged.

We note briefly several substantial bases upon which society grounds its prohibition of these and similar materials. As the American Law Institute noted in incorporating a prohibition of obscenity as part of its recommended Model Penal Code, there is reason to believe that obscene materials constitute a source of tension and disturbance through the creation of deep-seated feelings of shame and morbidity in persons exposed to them (A.L.I. Model Penal Code, § 207.10, Tentative Draft No. 6, pp. 5, *et seq.*). Obscenity statutes also undoubtedly constitute an attempt to preserve and maintain public morality, not unrelated to similar legislation prohibiting polygamy, public nudity, prostitution, gambling and narcotics. (See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col. L. Rev. 391). In addition, although opinion is sharply divided on the question, some substantial view exists that the distribution of obscenity is more or less directly related to the commission of anti-

³ See A.L.I. Model Penal Code, Proposed Official Draft (1962) § 251.4.

social acts by at least some of its recipients. The prohibition of obscenity on these, and perhaps other, grounds is neither recent nor unique. *Roth* itself notes the long-standing and almost universal condemnation of such material in this and other countries.

The federal obscenity statutes play a limited and supplementary role in the scheme of regulation thus permitted by *Roth*. The decision whether, and to what extent, to regulate obscenity within the constitutionally permissible area is primarily for the States, and virtually all States exercise the power to some degree.⁴ Federal statutes are supplementary—"to control what the States cannot" (*Hoke v. United States*, 227 U.S. 308, 321). Federal power is thus used to prevent the almost total evasion of State regulation which might result from the use of interstate facilities, immune from State control, to distribute material prohibited in all, or almost all, localities. See *Brooks v. United States*, 267 U.S. 432, 436; *Lottery Case*, 188 U.S. 321, 357. For this reason, the federal statutes incorporate national standards of pruriency, offensiveness and redeeming value and they are not properly invoked unless a wide national consensus exists that the material should be prohibited and is without redeeming value.

Amici appear not to challenge directly the proposition that some obscene material bears so little rela-

⁴ *Roth* noted that, in 1957, all 48 States had obscenity prohibitions, 354 U.S. at 485 n. 16, and we are not aware that any of these have been repealed in the years since *Roth*. We have found no obscenity statute in Hawaii. Alaska Statutes, 11.40.160, however, makes it unlawful, *inter alia*, knowingly to distribute a "sexually indecent comic book."

tionship to the protected areas of free speech and free press that it may be regulated by federal statutes in light of its universally recognized offensiveness. They do, however, suggest that the imprecision of the standard for determining what is thus obscene, and the difficulty of applying any standard to borderline cases, has a repressive or deterrent effect upon the dissemination of some questionable material which merits First Amendment protection, and that this effect is sufficient reason for holding all obscenity regulation invalid. The argument that the standard of obscenity is too imprecise "to withstand the charge of constitutional infirmity" (354 U.S. at 489) was raised and rejected in *Roth*. It seems fair to observe, in addition, that the fears of undue repression of questionable material as a result of the *Roth* holding are simply not borne out. The years since *Roth* have seen numerous examples of widespread distribution of material previously thought to be clearly within the prohibited area, as well as a growing frankness regarding the public discussion of sexual subjects. These materials include not only well known "pornographic" books such as *Tropic of Cancer*, but a proliferation of erotically oriented magazines and pocket novels offensive to substantial segments of the community and of relatively little, if any, redeeming value. In view of this experience, *Roth* has clearly not operated as an instrument of repression.

In sum, and as petitioners assume for purposes of their own attacks upon the convictions here, there is no occasion at this time to reexamine the holding of

Roth that the First Amendment does not invalidate federal statutes regulating the distribution of obscene material which is dominantly prurient and offensive and has no redeeming social importance. We turn now to the question whether the trial court and the court of appeals applied the correct standards for determining whether the materials here at issue were obscene.

II

THE COURTS BELOW APPLIED THE PROPER STANDARDS IN DETERMINING THE MATERIALS IN THIS CASE TO BE OBSCENE

The test of obscenity adopted by the Court in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). See, also, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482, 486 (opinion of Mr. Justice Harlan and Mr. Justice Stewart), and *Jacobellis v. Ohio*, 378 U.S. 184, 191-192 (opinion of Mr. Justice Brennan and Mr. Justice Goldberg). The courts below unquestionably applied this test, as their findings, summarized in the Statement, *supra*, pp. 5-9, show. We submit that, in addition, their definitions of the various elements of the test were clearly correct.

In order to give meaning to the term "prurient interest" the courts below invoked the definition set out in the *Roth* opinion (354 U.S. at 487, n. 20) as well as the definitions of obscenity which appear in the cases cited in that opinion (354 U.S. at 489, n. 26). They correctly ruled that the relevant question in this regard was whether the dominant theme and appeal of

each publication would be a morbid and shameful pre-occupation with sex, as opposed to a healthy sexual interest, and they found that it would. Thus, as to *Eros* and *The Handbook*, the trial judge found that each "appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 352-353). As to *Liaison*, the judge found that it was published "for the purpose of appealing to the prurient interest of the average individual" and that it "primarily and as a whole is a shameful and morbid exploitation of sex" (R. 352). In addition, the judge found that each publication "creates a sense of shock, disgust and shame in the average adult reader" (R. 352-353). The court of appeals made similar findings after an independent examination of the materials (R. 387-391).

Both courts below thus properly understood that the dissemination of an utterance lacking in social importance is forbidden under the federal statute only if its dominant theme constitutes an appeal to morbid and shameful prurient interest; as they recognized, the statute does not purport to suppress all worthless utterances. Both courts also properly and explicitly understood that, at least in a case like this one where the material was not aimed at a special audience with perverse or unusual sexual interests, the question was its impact upon the "average adult reader." Thus neither court viewed the material in light of its effect upon "particularly susceptible persons," which *Roth* held to be improper (354 U.S. at 489); and each also viewed the publications "as a whole" as *Roth* requires (*ibid*). That is, parts of a unitary work, like *The*

Handbook, may not be taken out of context and judged separately in determining obscenity. On the other hand, we believe that the trial judge correctly focused upon individual articles in judging the obscenity of *Liaison* and *Eros*, which are collections of individual pieces tied together only by the fact that all deal with erotic or sexual subjects. Although such anthologies must also be viewed "as a whole," that does not mean that the distribution of independent obscene works becomes privileged if sandwiched between non-obscene works to which they bear no integral relationship.⁵

Each court further understood that the question of obscenity must be decided by reference to the general standards of the national community, not in terms of predilections or special values restricted to particular localities; the court of appeals stressed, as to each publication, that it offended "national community standards" (R. 389-391). The courts below also clearly understood that a work cannot be considered obscene unless it is offensive in the sense that it goes substantially beyond national standards of permissible candor. The trial judge explicitly found *Liaison* and *The Handbook* each "patently offensive on its face" (R. 352-353), and his discussion of *Eros* (R. 362-366; Statement, *supra*, pp. 6-7) shows that he also deemed it offensive. The court of appeals found all three works "offensive" in light "of national standards" (R. 389-391).

⁵ See *Collier v. United States*, 283 R. 2d 780, 782 (C.A. 4) ("a person who mails a picture or pictures obviously obscene does not escape the condemnation of the statute by placing

Having found that each publication in issue met the tests of pruriency and offensiveness, the courts below also separately inquired, as an additional safeguard, whether the materials nevertheless had any "redeeming social importance" (354 U.S. at 484). If such redeeming importance had been found, the First Amendment would have been applicable regardless of the otherwise prurient and offensive character of the publications. Each court rejected any redeeming importance for the three works. The trial court found that each "has not the slightest redeeming social, artistic or literary importance or value" (R. 352-353), and the court of appeals rejected, for each publication, the particular redeeming qualities claimed for it (R. 389-391.) We note, in this connection, that the courts properly and explicitly considered not only social, scientific or intellectual importance, but artistic and literary importance as well.

The courts below thus apparently found, upon examination, that each publication was *wholly* devoid of redeeming value. This may have been, in reality, too strict a test. For just as pruriency and offensiveness must be judged in light of the work "as a whole," so, we believe, must the existence of redeeming importance. Petitioners contend that a publication or utterance falls without the First Amendment only if it is "totally devoid of value" (Pet. Br. 32). We submit, however, that if, for example, the conced-

them in a package with other pictures not obscene"); *Flying Eagle Publications, Inc. v. United States*, 285 F. 2d 307, 308 (C.A. 1) ("[a]n obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details").

edly pornographic works which petitioners introduced as exhibits in this case each contained a single well turned phrase of literary merit, a sentence or two of social comment flowing from the bizarre situations described in the book, or a particular photograph or drawing of some artistic value, they would not therefore fall within the absolute protection of the First Amendment. Few works are so offensive and so flooded in every last line and detail with prurient appeal that no claim can be made that particular isolated segments also appeal to some other interest. The existence of redeeming importance must therefore be judged in view of the whole work, with regard to which particular details may become insignificant. In making this assessment, it would not be remiss to take into account the audience to which the utterance is obviously directed and distributed. The trial judge's discussion of *Eros* (R. 362-366) indicates that he followed this approach; in all events, whatever error was made in this regard below favored petitioners rather than the prosecution.*

* Petitioners' contentions (Pet. Br. 57-58) that essential elements were lacking from the findings of fact in respect to *Eros* and *Liaison* are insubstantial. Petitioners urge that the trial court failed to find "patent offensiveness" with regard to *Eros* and "prurient interest appeal" with regard to *Liaison*. Since a judgment of obscenity involves a characterization, there is only one essential finding—that material is, or is not, obscene. Subsidiary findings regarding the existence of the elements of the test for obscenity are certainly useful upon review in judging whether the proper test was invoked but, as we have shown in the text, there is no question here that both courts below understood and properly defined all the elements of the relevant *Roth* standard. Any failure to verbalize findings regarding particular elements of the test with respect to *Eros* and *Liaison* there-

Petitioners appear to argue (Pet. Br. 40-56) that, in light of the record made in the trial court, the findings of obscenity below should be reversed as being without evidentiary support. As petitioners note, opinion evidence was indeed offered by petitioners' witnesses to show that the works here did

fore do not cast doubt upon the courts' proper understanding of *Roth*; nor do they infect the validity of the convictions in light of the presence of the ultimate finding of obscenity as to each publication.

We submit, moreover, that, fairly read, the findings below cover each relevant element of obscenity with regard to each publication. The trial judge found that *Liaison* "primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest" and that it "treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader" (R. 352-353). It would call for a peculiarly narrow view of these observations to conclude that the judge found merely that *Liaison* had the "purpose" to appeal to prurient interest, but did not have such appeal itself. As to *Eros*, the judge concededly did not indicate in his conclusory findings that he found it to be offensive in light of community standards. In his opinion, however, he mentioned a number of items, constituting the dominant parts of the whole, in which "one has little difficulty in finding all of the requisite elements of obscenity," specifically describing one segment as consisting "of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior," and another as constituting "a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination" (R. 364). It is thus clear that he found these items sufficiently offensive. Since he found that the dominant tone of the magazine flowed from them (R. 362-363), a finding of offensiveness is properly inferred, (1) in light of his ultimate conclusion of obscenity, and (2) in light of his obvious understanding that that ultimate conclusion required a determination that the material went beyond customary limits of candor (R. 360).

not dominantly appeal to prurient interest, did not go substantially beyond contemporary standards of candor, and that they had significant redeeming social importance. However, as the courts below held, the ultimate determination of obscenity must be made by courts in light of an independent examination of the materials in issue and not by expert witnesses. Cf. *United States v. Kennerly*, 209 Fed. 119, 121 (S.D. N.Y.). With regard to community standards, the most that has ever been claimed is that a defendant has a right to "enlighten" the trier of facts. See *Smith v. California*, 361 U.S. 147, 165 (Frankfurter, J., concurring), 172 (Harlan, J., concurring). The trier is obviously not bound by the particular evidence offered. See *Kahm v. United States*, 300 F. 2d 78 (C.A. 5), certiorari denied, 369 U.S. 859. Similarly, the introduction of opinion testimony cannot establish conclusively that a work has redeeming importance or that it does not have prurient appeal. After considering both the testimony and the works themselves, the courts below rejected petitioners' opinion evidence on the issues determining obscenity; this rejection was properly within the trial court's authority and was not reversible error.⁷

Finally, petitioners argue for a different verbalization of the test of obscenity from that used in *Roth* and in the courts below. In their view "only material properly classified as 'hard-core [pornography]' meets the standard of obscenity enunciated by this Court" (Pet. Br. 40). A mere change in labels would not,

⁷ The rejection was made explicit with regard to the redeeming value of *The Handbook* (R. 352, 366, 390).

we think, make the underlying issues of policy more malleable (*Jacobellis v. Ohio*, *supra*, 378 U.S. at 201 (Warren, C.J., dissenting)), and a "hard-core pornography" test would most likely be nothing more than such a change in verbal characterization. For example, *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, holds that only "hard-core pornography" can be constitutionally reached by obscenity statutes (383 P. 2d at 160-162) but, as it defines the term, all material that is obscene under the *Roth* test would also meet the definition of hard-core pornography (*id.* at 163). In this case, moreover, the trial judge, in addition to finding that all three works satisfied the *Roth* standard, simultaneously found two of them to be "hard-core." As to the dominant material in *Eros*, he found that "[t]here is no notable distinction between the aforesaid * * * and the admittedly obscene ["hard-core"] material which was in evidence for comparison purposes" (R. 364); as to *The Handbook*, he specifically found it to be "a perfect example of hard-core pornography (R. 367).

Insofar as a hard-core pornography test would limit, rather than merely re-characterize, the concept of obscenity, petitioners appear to suggest that it applies to only a special class of erotic works having certain themes developed in a unique way to achieve a particular psychological effect, *i.e.*, works showing "a succession of increasingly erotic scenes [of certain specified types] without distracting non-erotic passages * * * all described in taboo words." (See Pet. Br. 38 n. 17.) Such a limited psychological concept, however, would not seem adequately to reflect society's

legitimate interest in prohibiting classes of lewd, vulgar or filthy works of no redeeming value not falling within this special psychological category—sentological or purely sadistic materials, for example, or vulgar erotic materials without the progressive build-up of erotic tension which petitioners deem vital. Moreover, petitioners' suggested concept admittedly has no general utility as applied to visual rather than verbal utterances.

There is, in sum, no reason to substitute a new "hard-core" standard of uncertain content for the *Roth* test, which incorporates the definition refined over many years in judicial decisions and incorporated in the Model Penal Code. We rest therefore on the proposition that the courts below applied the *Roth* standard in determining obscenity in this case. Their opinions below show scrupulous adherence to the *Roth* definition and petitioners point to no specific definitional error affecting their convictions. The remaining questions concern the correctness of the application of that standard to the three specific materials here in issue.

III

THE FINDINGS OF OBSCENITY BELOW WERE PERMISSIBLY BASED UPON A REASONABLE CHARACTERIZATION OF THE MATERIALS IN ISSUE

Whether the materials involved in particular litigation contain sufficient elements of pruriency and offensiveness—while lacking redeeming importance—to come within the constitutional application of 18 U.S.C. 1461, is a question of ultimate judgment upon which no amount of argumentation can substitute for an examination of the materials themselves. If the Court deems such an examination appropriate in this case,

we recognize that it will form the principal basis for decision here. We are also aware that, in undertaking such an examination, the Court may deem itself free to come to a constitutional judgment upon the question of obscenity independent of that made by the courts below. See the opinions of Mr. Justice Harlan in *Roth v. United States*, 354 U.S. at 498, and of Mr. Justice Brennan in *Jacobellis v. Ohio*, 378 U.S. at 190. Nor do we urge in this case that there is no rational basis upon which this Court could find some of these materials not to be obscene. The legal characterizations of *Eros* and *The Handbook* appear to us, in particular, to involve legitimate room for argument, although we believe that the obscenity of *Liaison* appears with considerable clarity. For these reasons, we shall direct our argument (see *infra*, pp. 29-34) on this aspect of the case to an enumeration of the factors that, in our view, affirmatively support the findings of obscenity below.

While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the *Roth* test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of pruriency and offensiveness to the reasonable judgment of the courts below. In terms of vindicating the affirmative values of the First Amendment, the issue of redeeming importance is of crucial concern: Obscenity legislation must not be used to cut off the legitimate flow and

interchange of ideas and artistic expression, and this Court is appropriately the ultimate guardian of such communications. Once the Court has assured itself, however, that the federal statutes have not been used in a particular case to inhibit communications with an affirmative claim to the protections of speech or press, we submit that the remaining questions—whether the particular materials involved are sufficiently prurient and offensive—might appropriately be left to the reasonably based judgments of the lower courts. Pruriency and offensiveness are not constitutional absolutes, as is the presence of redeeming importance; they must be judged somewhat subjectively in the light of the degree of the probable impact of the materials and in light of the degree of their deviation from the shifting standards of taste and candor present in the national community. The Court may well feel that it is not in an especially advantageous position to exercise a fully independent judgment regarding these factors. We believe, moreover, that the consequences of possible error in making the evaluation of offensive or prurient appeal in particular cases—so long as the materials can reasonably be characterized as obscene—is not of important constitutional significance if the material involved has, indeed, no redeeming importance affirmatively calling for its protection under the First Amendment.

The most important issue, in short, is whether governmental power has been used to regulate the market place of ideas or to suppress authentic artistic expression. This is a judgment which can normally be made without delicate psychological and sociological

analysis, and it is one upon which this Court's independent view seems most appropriate.

We turn now to an enumeration of the factors which, in our view, reasonably support the conclusions of obscenity reached by the courts below as to each publication in issue.

1. *Liaison*.—Substantial portions—and perhaps all—of *Liaison* consists of dirty jokes and vulgar and smutty accounts of sexual topics with no evident purpose other than to appeal to prurient interest. For example although the introductory statement asserts that “[w]e will not carry any salacious material,” the next line gratuitously sets forth three obscene four-letter words as examples of what will not be sanctioned in the publication, and the paragraph concludes with an additional gratuitous obscenity. Pages 4-5 contain a smutty article on the possible nutritive value of a form of sodomy, called “Semen in the Diet,” and pages 5-6 are a collection of dirty jokes and rhymes. In light of this material, the decision of courts below that *Liaison* substantially constituted an offensive appeal to prurient interest was soundly based. Indeed, one of petitioners' own witnesses—an expert on mass culture—testified that *Liaison* was “an extremely tasteless, vulgar and repulsive issue” and that he considered it “not a particularly interesting book. It has no literary value, I would say” (R. 236-237).

Petitioners suggest that *Liaison* is not obscene because it is not “erotically stimulating” and because one article, “Slaying the Sex Dragon,” by Dr. Albert Ellis (occupying 2½ pages out of an issue of 6 pages)

has redeeming importance (Pet. Br. 54-56). (Petitioners appear to concede that the remainder of *Liaison* has no such importance.) We submit, however, that vulgar sexual material need not be dominantly erotic to be prurient: its pruriency may lie not only in its erotic stimulation but in its appeal to "a shameful or morbid interest in nudity, sex, or excretion * * * if it goes substantially beyond customary limits of candor in description or representation of such matters * * *" (A.L.I. Model Penal Code, § 207.10(2), Tentative Draft No. 6, 1956, cited approvingly in *Roth*, 354 U.S. at 487 n. 20). As to the article by Dr. Ellis, we agree that, standing alone, it may constitute a non-obscene "espousal of freedom of sexual conduct" (Pet. Br. 54). It was not, however, published alone and its presense does not privilege a publication otherwise composed of obscene material which has no integral relationship to the redeeming feature. A group of pornographic photographs, for example, surely does not become privileged because published interspersed with some nude photographs of artistic value.

In sum, substantial portions of *Liaison* are composed of offensive matter concededly of no redeeming importance; the judgment of the district court that it was "dirt for dirt's sake" (R. 353) was clearly a reasonable characterization. The convictions as to *Liaison* may be affirmed on this basis despite the presense, *arguendo*, of redeeming non-obscene material which would have been protected by the First Amendment if published alone.

2. *Eros*.—The judgments as to *Eros* rest upon four articles found to be obscene by the trial judge (R. 363-364). As we have said, *supra*, pp. 19-20, and in our discussion of *Liaison*, we believe that in a publication, like *Eros*, which is a composite of independent works tied together only by the fact that they all treat sex in some manner, a judgment of obscenity as to the whole may thus be based upon some of its parts—so long as they are significant in light of the whole. There is no danger that material of some value will thereby be suppressed, since it may freely be published alone and it loses nothing by being severed from obscene material with which it has no integral relationship. The opposite rule would, on the other hand, privilege obscene material merely because of its physical connection with non-obscene material.

Decision as to *Eros* therefore rests upon the obscenity of the four articles noted by the trial judge (since they clearly constitute a significant portion of the whole magazine). These are *The Natural Superiority of Women as Eroticists* (*Eros*, pp. 65-67); excerpts from *My Life and Loves*, by Frank Harris (*Eros*, pp. 39-48); *Black & White in Color* (*Eros*, pp. 72-80); and *Bawdy Limericks* (*Eros*, pp. 60-64). We believe that the judgments below that these four articles are prurient and offensive, and lacking in redeeming importance, are reasonably supportable. *The Natural Superiority of Women* contains highly erotic material of great sexual explicitness excerpted from two books and reproduced in bold-faced type. The connecting commentary, in ordinary type, is ex-

tremely brief and the Court may deem it of insignificant redeeming importance upon an independent examination. The excerpts from Frank Harris' extensive autobiography, *My Life and Loves*, are almost entirely of explicit sexual accounts contained in the total work. While these erotic passages may have value as integrated into the whole work, such passages, we believe, may lose their redeeming importance when set forth out of context as isolated sexual descriptions. The prurient and potentially offensive elements of *Bawdy Limericks* and *Black & White in Color* (containing photographs of a nude man and woman in amorous poses) also seem apparent. Their obscenity, we believe, turns upon whether, upon an independent examination, the Court finds them to contain redeeming artistic or literary value which would place them within the protection of the First Amendment. Finally we note that, as to *Eros*, its presentation seems to show a conscious attempt to approach as close to the borderline of obscenity as possible, an element which may, we submit, be deemed determinative in an otherwise doubtful case.

3. *The Handbook*.—We think there is little doubt that, as the trial judge found, *The Handbook* is "a vivid, explicit and detailed account of a woman's sexual experiences from age three to age thirty-six years" (R. 351-352), with the descriptions leaving "nothing to the imagination" (R. 366-367). For some examples of its content in this regard, see *The Handbook*, pp. 45-46, 77-78, 140-141, 167-168 and 207. This and similar material, which pervades the book, constitutes a reasonable foundation for the conclusion

below that *The Handbook* contains the requisite dominant elements of pruriency and offensiveness, if the Court also concludes that it has no redeeming social importance.

The importance of *The Handbook* is alleged by petitioners to be threefold: (1) its informative value as a true autobiographical account of sexual experiences, (2) the social comments upon sexual mores contained within the book, and (3) the book's utility in the treatment of psychological and medical problems (Pet. Br. 47-52). If *The Handbook* has such values, we recognize that it comes within the protection of the First Amendment, regardless of its otherwise prurient and offensive character, so long as the distribution of the book reflected the social values claimed for it. See the Chief Justice's opinion in *Roth*, 354 U.S. at 494. However, the trial judge rejected the testimony supporting the claim of social value, including the testimony of the authoress of the book (R. 352, 366), and the record does not show that the distribution of *The Handbook* by petitioners was limited to those who would use it in a clinical, educational or professional manner but, on the contrary, suggests that petitioners attempted to place it in general circulation among many persons to whom its asserted values would have been minimal. These facts provide a basis for a finding of lack of redeeming importance, but the Court's independent judgment can probably only be exercised after a fairly thorough examination of the book itself.

In sum, we find a clear rational basis for the findings below of pruriency and offensiveness as to each

work. In addition, the portions of *Liaison* which meet this test, in our view, are plainly without redeeming importance and bear no integral relationship with a single article in *Liaison* for which redeeming importance is claimed. The lack of redeeming importance of *Eros* and *The Handbook* is open to greater question, but here, too, there is basis for the findings below.

IV

NO PROCEDURAL ERRORS VITIATE THE CONVICTIONS

Petitioners assert several miscellaneous procedural errors (Pet. Br. 57-66) which may be disposed of briefly.

A. Petitioners' contention (Pet. Br. 60-61) that the judge indicated, by his opinion, that he relied upon *The Handbook's* purported effect on adolescents in determining its obscenity, is untenable. The case is unlike *Volanski v. United States*, 246 F. 2d 842 (C.A. 6), where psychiatric testimony concerning effects upon adolescents was apparently introduced as part of the government's case-in-chief and the trial judge's oral opinion clearly revealed that this testimony was instrumental in bringing him to his decision (*id.* at 843 and n. 1). Here, the testimony complained of was part of the Government's rebuttal case, intended only to counter petitioners' evidence and not to establish the obscenity of the materials. To the extent that the trial judge indicated any reliance at all upon the testimony, it was only by way of partial explanation of his rejection of petitioners' evidence, which, as his opinion demonstrates beyond doubt, would have been rejected

in any event. In actuality, the effect of *The Handbook* upon adolescents was "regretfully note[d] in passing" (R. 366); the judge's only other comment was that "[j]ust as [adolescents] cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community" (R. 368). There is nothing in these remarks which is inconsistent with the conclusion that the judge scrupulously adhered to the *Roth* test.

B. Petitioners' contention (Pet. Brief 58-60) that the trial judge erroneously imputed to all defendants an intent which could be assigned only to Eros Magazine, Inc. is also unpersuasive. The evidence of intent related to the action of the associate publisher of the magazine in attempting to obtain postmarks for its advertising material which would be suggestive of sexual activity. (The post offices involved were those at Blue Ball, Pa., Intercourse, Pa. and Middlesex, N.J.). Petitioners complain that there was "no evidence that petitioner Ginzburg knew of or directed" the attempt (*id.* at 58). However, Ginzburg's control over all of the corporate petitioners was evidenced by his stipulation that he knowingly caused to be mailed the materials named in the indictment, and by his signing the stipulation on behalf of each of the corporate petitioners (R. 150). Additionally, the testimony of the editor of *Liaison* indicated that Ginzburg kept close control over his various publishing endeavors (R. 173-183). It was thus fair to conclude that he knew and approved the attempt to obtain postmarks for *Eros*. The inference as to his intent in connection with *Eros* could properly be imputed to the

two other corporate petitioners in view of his simultaneous operation of their related activities. In any event, as the court of appeals noted (R. 392), the point is of slight moment since it was stipulated that all of the petitioners had knowledge of the content of the works here in issue and such knowledge is the principal basis for establishing *scienter* in an obscenity prosecution. See *Rosen v. United States*, 161 U.S. 29, 41-42; *Price v. United States*, 165 U.S. 311; *Roth v. United States*, 354 U.S. at 491 n. 28; *Kahm v. United States*, 300 F. 2d at 86; *United States v. Oakley*, 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368 U.S. 888.

C. Finally, as the court of appeals also noted (R. 391-392), petitioners' complaint (Pet. Br. 61-66) concerning the trial court's delay in making special findings requested by petitioners is without substance. The only "finding" that can be made in a case such as this is that the works are obscene under the relevant test. Having made this ultimate finding in its general verdict, the court was free to take some time to make explicit the particular basis of its general ruling. Rule 23(c) of the Federal Rules of Criminal Procedure⁸ does not require the special findings to be made before or simultaneously with the general finding, and petitioners do not suggest that the trial judge was unaware of the facts or the proper *Roth* standard at the time of his general finding.

⁸ Rule 23(c) provides:

In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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NOVEMBER 1965.

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(Submitted upon consent of the parties)

JOHN J. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

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EROS MAGAZINE, INC. and LIAISON NEWS LETTER,
INC.,

v.

Petitioners,

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF AMERICAN BOOK PUBLISHERS
COUNCIL, INC., AS AMICUS CURIAE**

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**BRIEF OF AMERICAN BOOK PUBLISHERS
COUNCIL, INC., AS AMICUS CURIAE**

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 188 members of the Council publish and distribute approximately 90% of all general books. None of the petitioners is a member of the Council.

The Council is basically interested in safeguarding freedom of the press as guaranteed by the First and

Fourteenth Amendments to the Constitution. As a matter of policy, the Council takes no position as to the obscenity or non-obscenity of any publication. Accordingly, it takes no position with respect to the obscenity or non-obscenity of the publications here involved. Instead, the Council's concern is that, in connection with obscenity litigation, this Court apply tests to all publications which will not impair freedom of the press, since any criteria promulgated herein will guide the actions of all responsible publishers. The Council is also concerned lest the procedure applied herein should result in a stifling of free expression.

ARGUMENT

A. The Tests Urged to be Applied

Since 1957 various members of this Court, speaking either through opinions of the Court or in separate opinions, have advanced three separate criteria applicable in obscenity adjudications. We believe that this Court itself has applied all three of these criteria before finding any publication obscene. However, we urge that there be a clear restatement by this Court so as to make it indisputable that *each* of these criteria must be met before a publication will be adjudicated obscene.

We shall examine these criteria in turn.

1. The absence of social importance.

In *Roth v. United States*, 354 U. S. 476 (1957), this Court recognized that:

“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach

upon the limited area of more important interests.”
(p. 484)

The Court then went on to say that obscenity was excluded from constitutional protection because it is “utterly without redeeming social importance” (p. 484). This Court thereupon took pains to emphasize the importance to society of courts not using the label of obscenity to restrict the portrayal of sex—for example, in art, literature and scientific works.

The Court stated:

“However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama*, 310 U. S. 88, 101, 102, 84 L ed 1093, 1102, 60 S Ct 736:

“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to*

enable the members of society to cope with the exigencies of their period.' (Emphasis added [by Court].)" (pp. 487-8)

This standard was reiterated by Mr. Justice Brennan in his opinion delivering the judgment of this Court in *Jacobellis v. Ohio*, 378 U. S. 184, 191 (1964):

"We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.*, at 484, 487, 1 L ed 2d at 1507, 1508. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 3 L ed 2d 1512, 79 S. Ct. 1362, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Repr. 800, 813 (1963)."

We submit that under *Roth* and *Jacobellis* courts should *first* determine whether the work in question is completely without social importance. So long as the work either "advocates ideas" or "has literary or scientific or artistic value or any other form of social importance", it should not be adjudged obscene. The absence of this test would result in a serious curtailment of freedom of the press. Many socially useful works could be

suppressed directly. Additionally, many publishers would be afraid to publish socially valuable works because of fear that they might ultimately be adjudicated obscene. This danger can be avoided if a publisher knows that the social importance of a work is, by itself, sufficient to prevent it from being adjudged obscene. Thus, we submit that social importance should be the first question to be resolved—and a finding of the slightest social importance should require an adjudication of non-obscenity.

2. Patent offensiveness.

In *Roth v. United States*, *supra*, this Court quoted with approval Section 207.10 (2) of Tentative Draft No. 6 of the A.L.I. Model Penal Code (now Section 251.4 (1) of the proposed Official Draft). That section was described by the Court as not significantly different from the definition of obscenity developed in the case law.

“* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters * * *” (p. 487, n. 20).

Subsequently Mr. Justice Harlan, in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962), delivering the opinion of this Court and speaking for himself and Mr. Justice Stewart, pointed out that the test propounded in the Model Penal Code was a dual test; that to be obscene a work must not only appeal to prurient interest but also must be patently offensive. Mr. Justice Harlan emphasized that the patently offensive test was necessary in order to maintain the constitutional protections of free speech and free press.

"To consider that the 'obscenity' exception in 'the area of constitutionally protected speech or press,' Roth, 354 U. S. at 485, does not require any determination as to the patent offensiveness vel non of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. For one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of Section 1461 would doubtless encounter constitutional barriers. Roth, 354 U. S. at 487-489. Consequently we consider the power exercised by Congress in enacting Section 1461 as no more embracing than the interdiction of 'obscenity' as it had theretofore been understood. It is only material whose indecency is self-demonstrating and which, from the standpoint of its effect, may be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of Section 1461." (pp. 487-488).

The patently offensive test was also adopted by Mr. Justice Brennan in *Jacobellis v. Ohio*, *supra*, where he delivered the judgment of this Court and spoke for himself and Mr. Justice Goldberg.

We urge, therefore, that this Court should require a work to be patently offensive before it can be adjudicated obscene. This test is implicit in this Court's decision in *Roth* and it has been specifically approved by at least four Justices of this Court. (Mr. Justice Harlan and Mr. Jus-

tice Stewart in *Manual Enterprises* and Mr. Justice Brennan and Mr. Justice Goldberg in *Jacobellis*).

3. The appeal to prurient interest.

The case of *Roth v. United States*, *supra*, held that to be adjudged obscene a work must meet the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" (p. 489). This test has been consistently applied since the *Roth* case. We submit that the *Roth* test based upon appeal to prurient interest must likewise be met for any work to be adjudged obscene.

B. The Use of a Criminal Obscenity Statute

We join with The Authors League of America, Inc. in the position advanced in Point II of its *Amicus Curiae* brief herein that neither publishers nor booksellers should be subjected to criminal sanctions unless they continue to disseminate a work which has been adjudged obscene in a non-penal adversary injunction proceeding such as that provided by Section 22-a of the New York Code of Criminal Procedure. The reasons for this position are as stated in Point II of the brief of The Authors League.

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COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

I

**THE PUBLICATIONS AT ISSUE HAVE REDEEMING SOCIAL
IMPORTANCE**

There is no significant difference between petitioners' and respondent's views of the proper standard for determining obscenity. The Government agrees that "obscene" publications have three characteristics. Their "dominant theme and appeal [is to] a morbid and shameful preoccupation with sex, as opposed to a healthy sexual interest" (Res. Br. 18-19; cf. Pet. Br. 35); their prurient themes are expressed in a manner which "goes substantially beyond national standards of permissible candor" (Res Br. 20; cf. Pet. Br. 33-

34); and they are "without redeeming social importance" (Res. Br. 11, 21; cf. Pet. Br. 29-33).¹

The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society.² Since it agrees that a work possessing redeeming social importance cannot be obscene, the Government's present position should compel reversal.

The Government argues, however, that the convictions for mailing *Eros* and *Liaison* can be sustained if the Court will exclude from consideration those parts which are admittedly of value and examine other portions as if each such portion was an independent work separately charged to be obscene. But breaking *Eros* and *Liaison* into parts is foreclosed by the Government's stipulation that "[t]he Indictment charges that [each of] the alleged non-mailable [publications] * * * is obscene when considered as a whole" (R. 149).³

¹ As to the last of these elements, the Government asserts that the redeeming social importance of a work cannot be established by merely "a single well-turned phrase", "a sentence or two of social comment" or "a particular photograph or drawing of some artistic merit" (Res. Br. 22), but does not argue that the claims of redeeming social importance of the publications at issue are predicated upon so slender a base. Therefore, even if the term "utterly without redeeming social importance" admits of a *de minimis* exclusion, it would have no bearing on the outcome of this case.

² *Eros* (Res. Br. 27, 34); *The Housewife's Handbook on Selective Promiscuity* (Res. Br. 27, 33-34); *Liaison* (Res. Br. 30).

³ The stipulation was furnished in lieu of a bill of particulars, petitioners having asked the United States, *inter alia*, to "state whether it is charged that the non-mailable material referred to in [the various counts] of the indictment are obscene when considered as a whole, or whether a part or parts thereof are obscene." The Government had also been asked: "If it is charged that a part or parts thereof are obscene, [to] set forth an exact copy of said part or parts."

It may be theoretically possible to focus upon portions of a non-integrated work when examining for prurient interest appeal or patent offensiveness,⁴ but unless it is charged that a particular article is obscene when considered as a separate entity, the redeeming social importance present in the whole work cannot be disregarded. In other words, the absence of redeeming social importance of some part of a work cannot negate the redeeming social importance which the whole derives from other parts.

Moreover, it was against the charge that Eros and Liaison were obscene "when considered as a whole" that petitioners defended. The Government did not single out or offer proof as to any particular portion of these publications nor did defendants try to establish the redeeming social importance of each and every article as an independent work.⁵ The trial judge convicted petitioners because, viewing Eros and Liaison as a whole, he found that neither had "the slightest redeeming social, artistic or literary importance or value" (R. 352-353). These convictions cannot be sustained on appeal in reliance on a charge not made, not proved, not defended, and not found. *Cole v. Arkansas*, 333 U.S. 196 (1948).

The Government does not even try to argue that the Handbook should be examined by parts rather than as

⁴ It is doubtful whether Eros could be classified as a non-integrated work. The trial court used the word "integrated" in describing Eros (R. 365), and dealt with it as a highly integrated work (R. 362-363).

⁵ One of the Eros articles to which the Government refers, an expurgated condensation of the first volume of Frank Harris' "My Life and Loves" was not even mentioned during the trial. The other articles (with the exception of the photographic essay "Black & White in Color") were referred to only in passing.

a whole.⁶ Instead it seeks to sustain conviction on the Handbook counts by adding a new qualification to the concept of redeeming social importance, contending that the failure of the record to show that its distribution "by petitioners was limited to those who would use it in a clinical, educational or professional manner * * * provide[s] a basis for a * * * finding of lack of redeeming importance" (Res. Br. 33).

When in *Roth* this Court opened the door of constitutional protection of speech and press "only the slightest crack" to permit the exclusion from the mails of worthless garbage,⁷ surely it did not invite the exclusion of that which would be of value to some but not all. The suggestion that Government may establish occupational and educational qualifications and deny the right to read to those who do not qualify, raises constitutional questions of the utmost gravity. Cf. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

But even assuming that a statute, which made the redeeming importance of a work turn upon the professional or educational level of its readers, would not offend the Constitution, 18 U.S.C. § 1461 is not such a

⁶ A self-limitation not observed by the Citizens for Decent Literature whose *amicus* brief concludes with twenty-four pages of excerpts from the Handbook, presumably offered to assist the Court should it decide to return to the rule of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

⁷ In *Kingsley Books v. Brown*, 354 U.S. 436, 440-441 (1957), which adopted the *Roth* definition of obscenity, it was held that obscene material may be seized and destroyed. Once material is destroyed, how can the class to which (under the Government's hypothesis) distribution of a book would be constitutionally protected ever receive it?

statute.⁸ The statute under which petitioners were tried and convicted makes it a crime to "knowingly deposit for mail or delivery, anything declared by this section to be nonmailable." Far from depending upon the identity or characteristics of the addressee, the offense is complete even if the material is never delivered. It is entirely understandable therefore that the Government at trial offered no evidence to establish the identity or profession of the persons to whom petitioners mailed the Handbook.⁹

Finally, the Handbook's values do not exist only for the specialist. As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist, and its value in relieving sexual guilt brought about by ignorance and misapprehension cannot be realized if it is confined to the shelves of the physician. Above all, the Handbook's advocacy of change in laws and attitudes on sexual matters may not be partially suppressed by limiting those whom the author is permitted to persuade.

⁸ For an example of such a statute and a demonstration of the dangers of classification see Ohio Revised Code, § 2905.37 quoted in *Mapp v. Ohio*, 367 U.S. 643, 675, fn. 7 (1961) (dissenting opinion).

⁹ Contrary to the Government's assertion, the record does not "suggest that petitioners attempted to place [the Handbook] in general circulation among many persons to whom its asserted values would have been minimal" (Res. Br. 33). The only testimony with respect to petitioners' distribution of the Handbook shows that Documentary Books, Inc. mailed 5,543 copies of the Handbook (R. 162) as contrasted with the more than 6,000,000 pieces of mail sent out by Eros Magazine, Inc. (R. 161).

II.

**EVEN IF THE PUBLICATIONS' REDEEMING SOCIAL
IMPORTANCE IS DISREGARDED, PETITIONERS' CONVICTIONS
CANNOT BE SUSTAINED**

Attempting to prop up the conviction on the Liaison counts, the United States suggests that if Liaison is not "obscene", it is at least vulgar and filthy and thus within the statute (Res. Br. 14, 30). But the issue as to whether Liaison is "filthy" is not open in this proceeding. Before trial, the Government stipulated that "The *Indictment* charges that * * * 'Liaison' * * * is *obscene* when considered as a whole" (R. 149) (Emphasis added).

Seeking to avoid the effect of its pre-trial stipulation, the Government asserts that the "concept of obscenity" under 18 U.S.C. § 1461 includes the "vulgar and filthy" (Res. Br. 14, 29-30). The precise opposite is the law. *Swearingen v. United States*, 161 U.S. 446 (1896), squarely held that "coarse and vulgar" material is not "obscene".¹⁰ *United States v. Limehouse*, 285 U.S. 424 (1932), on which the Government relies, did not overrule *Swearingen*, it sustained an indictment for mailing filthy material on the ground that Congress had added the "filthy" as a new and additional class of unmailable material (285 U.S. at 426-427). The proposition that "filthy" and "obscene" are separate and different categories is so well established that in *Sinclair v. United States*, 338 U.S. 908 (1950), it was sufficient for this Court to merely cite *Swearingen* and *Limehouse* to show that the petitioner could not be convicted for mailing a "filthy" letter when the indictment charged that he had mailed an "obscene, lewd and lascivious letter".

¹⁰ The classification "obscene" pertains to "lewd" and "lascivious" matter having a "tendency calculated to corrupt and debauch the minds and morals of those into whose hands it might fall." *Swearingen v. United States*, 161 U.S. at 451.

Petitioners relied on the Government's stipulation that *Liaison* was charged with being "obscene" and defended against that charge. The trial court found petitioners guilty on that charge (R. 356, 360, 361, 368), and the court below affirmed on that basis (R. 385, 391). An affirmance in this Court based upon the different offense of mailing "filthy" matter would be a "sheer denial of due process". *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937); *Cole v. Arkansas*, 336 U.S. 196 (1948).

All that remains is the Government's argument that findings of prurient interest appeal and patent offensiveness "might appropriately be left to the reasonably based judgments of the lower courts" (Res. Br. 27-28) and, therefore, it is unnecessary for this Court to exercise an independent judgment on these matters with regard to the publications at issue. Although the suggestion might have a certain appeal, it loses sight of the fact that *Roth* held that obscenity, as therein defined, was a special classification historically excluded from constitutional protection. This being so, ascertainment of all the factors which identify obscenity—prurient appeal and patent offensiveness as well as lack of redeeming social importance—involves a matter of constitutional classification which this Court will not leave to the judgments of others.¹¹

Even if this were not so, before this Court abdicates the function of determining prurient interest appeal

¹¹ Plenary review is all the more required since the terms, prurient interest appeal and patent offensiveness, leave so much room for subjective application. Respondent admits that judgments as to these factors are made "somewhat subjectively" (Res. Br. 28), but inexplicably concludes that this argues against disturbing convictions by too searching an examination of the premises upon which they were based.

and patent offensiveness, it must be absolutely certain that the courts below found these factors to be present and that the process by which such findings were made assures their accuracy. In this case, neither condition is satisfied.

The Government concedes that the trial court never found Eros to be patently offensive¹² and must resort to inference to supply the finding that Liaison has prurient interest appeal (Res. Br. 22-23, ftn. 6). If any importance is attributed to the trial court's findings, direction of judgments of acquittal on the Eros and Liaison counts would be required (see Pet. Br. 57-58). Certainly they do not support the judgments of conviction.

Independent and apart from what the trial court's findings do or do not say, is the fact that they were made in gross disregard of the requirements of Rule 23(c), Federal Rules of Criminal Procedure, and even the most elemental concepts of due process. The Government is obviously unwilling to defend the manner in which these findings were made. It stops short with a statement that the Rule "does not require the special findings to be made before or simultaneously with the general finding" (Res. Br. 36) and does not even deal with the fact that the post verdict findings, ostensibly in support of the general verdict, were prepared by the prosecutor and submitted to the trial judge *ex parte*. In our brief at pp. 61-66 we present the trial court's failure to comply with Rule 23(c) as an independent

¹² The court below said that the missing finding as to Eros can be inferred from the trial court's other Eros findings (R. 391). The Government, unable to explain how, suggests that we look at the trial court's opinion, handed down over three months after the findings, and *infer* the missing finding from the opinion (Res. Br. 23, ftn. 6).

ground for reversal. Here we confine ourselves to arguing that findings made in this manner are entitled to no deference whatever. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964).

It is manifest that when the trial judge pronounced petitioners guilty, he was giving voice to a gestalt reaction to the publications at issue which had little or nothing to do with the standards enunciated by this Court. Everything in the record is consistent with this view. First, the trial judge denied the motion to dismiss the indictment because he considered the works to be *prima facie* obscene, a judgment he was prepared to make after having read only parts of them (R. 300, 358). Next, he interrogated defense witnesses on whether the Handbook advocated the practice of adultery and sexual acts which the law classifies as sodomy (R. 270, 272, 296, 297-298, 307, 309-311) and inquired whether teenagers would be led into sexual misconduct were they to read the book (R. 271-273, 296-298, 300-301, 304). He allowed the Government's rebuttal witness to testify at length as to the Handbook's assumed effect on adolescents (R. 321-324). Finally, he rejected or ignored all of the evidence that was inconsistent with his evaluation of the publications as "obscene"¹³ for no express or apparent reason other than his disagreement with the conclusion to which that evidence would lead.

¹³ The Government is wrong when it says that the trial judge "rejected" the testimony of all defense witnesses (Res. Br. 24). With the exception of opinion testimony bearing upon the redeeming social importance of the Handbook, the court did not reject the evidence offered by the defense, it just pretended that this evidence did not exist. Petitioners have never claimed that expert testimony can "conclusively" establish that a work has redeeming social importance, does not go substantially beyond contemporary limits of candor, or does not have the requisite prurient interest appeal, but evidence bearing upon these questions cannot be arbitrarily disregarded.

At the time the trial judge found petitioners guilty he made no findings which would reveal the facts and standards he had in mind. The so-called "Special Findings of Fact", put into his hands by the prosecutor and proclaimed long after the verdict, were not findings, but incantations.

We believe the real reason for the suggestion that this Court should rest its judgment on such findings is that it enables the Government to avoid all discussion of whether those findings were correct in the light of the evidence. Its reluctance to engage in such discussion is understandable, for the evidence does not prove that which the Government had the burden of proving. Rather, as we have shown, the evidence in this case clearly establishes that the publications at issue do not make their predominant appeal to prurient interest and do not go substantially beyond that which society now tolerates in discussions of sex. (Pet. Br. 33-37; 43-45; 52-53, 55-56). Since the Government does not argue to the contrary, petitioners need say no more.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EBOS MAGAZINE, INC., LIAISON NEWS LETTER, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

Reply Brief of Amicus Curiae
Citizens for Decent Literature, Inc., an Ohio Corporation,
in Support of Respondent

I

The Government Did Not Concede That Any of the Works
Had "Redeeming Social Importance"

Petitioners in their reply brief state:

"The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society . . . "

We do not understand the respondent's position to be susceptible of such a construction. There is no concession by the U. S. Government that any of the works have *redeeming social importance*.

The government's position,¹ simply stated, is that a work may have social importance by itself, and yet have "no value" (1) when used as a part of a larger whole, which is designed for a different purpose from that from which the "part" acquired its value, or (2) when used as a whole, but for a different purpose from that for which it had value.

In the view of amicus, that portion of Judge Body's opinion which discussed the obscenity of "Eros, Vol. 1, No. 4, 1962" correctly and adequately sets forth the first proposition and hardly requires elaboration. However, this theorem can, perhaps, be more effectively demonstrated by a more isolated example. Suppose the etching on page 11 of Eros, depicting the biblical story of the incestuous act committed by Ammon on his sister Tamar, to be incorporated into and made an illustrated part of the cheap paperback book "Strange Bondage," (W-18)² published by Foremost Publishers, 65 Cadillac Square, Detroit, Michigan, and distributed nationally by World Wide News Company of Cleveland, Ohio. Certainly the art value of such an etching in an art gallery to a sophisticated art audience cannot be transferred so that it constitutes "value" to save a paperback which is designed for a different purpose, i.e.,

¹ Also the position of amicus and the trial and appellate courts. The trial and appellate courts did not find it necessary to discuss the second proposition, having agreed that the Housewife's Handbook on Selective Promiscuity was not a bona fide case history.

² "Strange Bondage" opens with an incestuous scene between brother and sister which is interrupted by an unexpected return of the parents. Thereafter brother and sister go their separate ways through sex orgy after sex orgy until they return to each others embrace in the final chapter to complete their act of incest.

whose predominant appeal is to prurient interest. If anything, it has a *negative value*, because under the circumstances it contributes, though in the smallest degree, to the predominantly prurient appeal of the paperback text.

The mere fact that Eros contains a number of such etchings, or the like, would not take it out of the "de minimis exclusion" which Petitioners are willing to admit to.³ Far from it. Each etching contributes a pictorial representation which lends itself to and reinforces the predominant prurient theme. Judge Body explained this in his opinion, where he said concerning other portions of Eros:⁴

"This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect . . ."

The second theorem acknowledges that a work may have social importance under a special set of circumstances, but "no value" when used for a different purpose from that for which it had value. Were the Housewife's Handbook a true case history it might be said to have value for a limited audience of professional people who have a legitimate interest in such case histories. As noted in footnote 1 however, the trial⁵ and appellate courts did not consider this aspect, having rejected the factual premise upon which petitioners' defense is based, i.e., that the book was an authentic case history. The government does not "seek(s) to sustain conviction on the Handbook counts by adding a

³ Petitioners' Reply Brief page 2, footnote 1.

⁴ United States v. Ralph Ginzburg et al, 224 F. Supp. 129, 134.

⁵ It bears emphasis that the trial court disbelieved the "accuracy of this book" and found it constituted "bizarre exaggeration." The author testified before Judge Body and, as a trier of fact, the trial judge had every right to pass on the matter of her credibility.

new qualification" as claimed by Petitioners.⁶ On the contrary, before the government is forced to reply to that theorem, this Court must first reject the above fact findings of the trial judge, a hurdle in Petitioners' path not easily overcome.⁷

Assuming that the state of the argument does place the government in a position where it is necessary to reply, as were this Court to reject the trial judge's factual determination as to the nature of the book, still the Petitioners are not able to avail themselves of the defense. 18 USCA 1461 is a criminal statute calling for the government to prove that the defendant has knowingly mailed subject matter, the predominant appeal of which is to the prurient interest of an average person of normal sexual impulses.⁸ All that the government need prove is that the defendant by his conduct abused a conditional privilege.⁹ A special audience is a matter of defense in the nature of justification, which the defendant failed to place in issue at the trial. Similarly the matter of a special audience is a part of the government's case in chief, where the people wish to rely

⁶ Petitioners' Reply Brief, page 4.

⁷ Amicus submits that the 24 page book outline of the Handbook, in the appendix of its amicus brief, is autoptical proof in capsule form in support of the trial judge's findings that he disbelieved the "accuracy" and found it constituted "bizarre exaggeration" and hard-core pornography. A central theme arrived at through an outlining process should be of as much assistance to this Court as Petitioners' conclusionary argument that: "As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist . . ." (See Petitioners' Reply Brief, page 5) .

⁸ *Grove Press Inc. v. Christenberry*, DCNY 1959, 175 F. Supp. 488, 499.

⁹ *U. S. v. Rebhuhn*, 109 F. 2 512, 514, cert. denied 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629.

on a test other than the "Roth" average person test. *U. S. v. Levine*, 83 F. 2 156, 158.

The *Roth* (*supra*), *Levine* (*supra*) and *Rebhuhn* (*supra*) cases are authorities against the Petitioners' statement¹⁰ that 18 U.S.C. 1461 is not a statute which makes the redeeming importance of a work turn upon the professional or educational level of its audience. See also amicus brief at pp. 68-72, discussing the variable nature of obscenity. Social importance is not determined in a vacuum.

II

The Concept of "Obscenity" Under 18 USC 1461 Includes the Sexually "Vulgar and Filthy"

Petitioners' reply that the concept of obscenity under 18 U.S.C. Section 1461 does not include the sexually "vulgar and filthy" as asserted by the government in its brief (Res. Br. 14, 29-30) is not supported by their authority, *Swearingen v. U. S.* *Swearingen* simply held that the language specifically set forth in the footnote of that case, which the court termed "exceedingly coarse and vulgar", did not have in it the lewd, lascivious and obscene tendency and the sexual impurity proscribed by the statute. There is no similarity between the *Swearingen* language noted in the footnote and that which is involved in this case.

The Court in *Swearingen* noted at page 451 that the word "obscene" had the same meaning as that term used in "obscene libel" in the Common Law. In *Roth* at footnote 20 this Court noted:

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code . . ."

Since the word "obscene" as used in Section 1461 has the same meaning as the word "obscene" as used in the Com-

¹⁰ Petitioners' Reply Brief, page 4.

mon Law Cases, and since the Common Law definition of "obscene" is the same as that stated in the A.L.I. Model Penal Code, then it would appear that the government is correct in its assertion. See, in particular, Respondent's Brief, page 15, footnote 3.

III

Constitutional Review Is Limited to the Determination Whether the Social Importance of the Conduct or Subject Matter Is Sufficient to Take the Case Out of the Realm of a Jury Issue

The Petitioners' Reply Brief takes issue with the alternative suggested by the government in its brief as to the manner of this Court's review:

"While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the Roth test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of prurency and offensiveness to the reasonable judgment of the courts below . . . "

In this connection, amicus finds itself at slight variance with the government's arguments. We submit that this Court's review is limited to the alternative stated, i.e., the sole question is whether the social importance of the conduct or subject matter is sufficient to take the case out of the realm of a jury issue. The historical role of a reviewing court in this area has heretofore been limited to a determination as to whether a jury issue has been presented. The fine line between "candor" and "shame" has always been a jury matter. *U. S. v. Kennerley*, 209 Fed. 119, 120; *U. S. v. Levine*, 83 F. 2 156, 157; *Roth v. U. S.*, 354 U.S. 476 at 490; *Kingsley Book Inc. v. Brown*, 354 U.S. 436 (Justice

Brennan, dissenting). We believe that this Court has, in fact, been following the mode of review noted, that is, limiting its plenary review of the case to the question of the redeeming importance of the conduct and subject matter involved. See Brief Amicus Curiae, pp. 46-51, 59.

Respectfully submitted,

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Office Supreme Court, U.S.
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Supreme Court of the United States 1965

October Term, 1965
No. 42

JOHN F. GAVEL, CLERK

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vs.

Petitioners,

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Respondent.

4 On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit.

October Term, 1965
No. 49

EDWARD MISHKIN,

vs.

Appellant,

STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of the
State of New York.

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WO-
MAN OF PLEASURE", G. P. PUTNAM'S SONS (In-
tervenor),

vs.

Appellant,

ATTORNEY GENERAL OF THE COMMONWEALTH
OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial
Court of Massachusetts.

Motion of the Committee of Religious Leaders of the City
of New York for Leave to Appear as Amicus Curiae,
Adopting as Its Own the Briefs of Amicus Curiae
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ration.

In its deep concern over the presence and continuing growth of Salacious Literature in this nation, the Committee of Religious Leaders of the City of New York has established within its framework a Committee for the Elimination of Salacious Literature, which has an absorbing interest in the obscenity cases pending before this Court. Said Committee has examined the briefs of Amicus Curiae Citizens for Decent Literature, Inc., heretofore filed in the above-mentioned cases, and has by appropriate resolution declared itself in complete agreement with, and adopted as its own, the position expressed and argued in those briefs.

The Committee of Religious Leaders of the City of New York respectfully moves for leave of Court to appear as Amicus Curiae in said cases, in support of and adopting as its own, the said briefs of Amicus Curiae Citizens for Decent Literature, Inc.

Respectfully submitted,

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United States Supreme Court

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Leave to Appear as Amicus Curiae Adopting as Its
Own the Briefs of Amicus Curiae Citizens for Decent
Literature, Inc., an Ohio Corporation.

The American Parents Committee, Inc. was incorporated in 1947 as a membership, non-profit, public-service association working for federal legislation on behalf of the nation's 70 million children. As such it entertains a deep concern over the presence and continuing growth of obscene materials in this Nation and a substantial interest in the doctrine of the obscenity cases pending before this Court.

The American Parents Committee, Inc., has examined the briefs of Amicus Curiae Citizens for Decent Literature, Inc., heretofore filed in the cases referred to above, and has by appropriate resolution declared itself in complete agreement with, and adopted as its own, the position, expressed and argued in those briefs.

The American Parents Committee, Inc., respectfully moves for leave of Court to appear as Amicus Curiae in said cases, in support of and adopting as its own, the said briefs of Amicus Curiae Citizens for Decent Literature, Inc.

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SUPREME COURT OF THE UNITED STATES

No. 42.—OCTOBER TERM, 1965.

Ralph Ginzburg et al., Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Third Circuit.
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[March 21, 1966.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A judge sitting without a jury in the District Court for the Eastern District of Pennsylvania¹ convicted petitioner Ginzburg and three corporations controlled by him upon all 28 counts of an indictment charging violation of the federal obscenity statute, 18 U. S. C. § 1461.² 224 F. Supp. 129. Each count alleged that a resident of the Eastern District received mailed matter, either one of three publications challenged as obscene, or advertising telling how and where the publications might be

¹ No challenge was or is made to venue under 18 U. S. C. § 3237.

² The federal obscenity statute, 18 U. S. C. § 1461, provides in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means of such mentioned matters . . . may be obtained

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than \$5000 or imprisoned not more than five years, or both, for the first such offense"

obtained. The Court of Appeals for the Third Circuit affirmed, 338 F. 2d 12. We granted certiorari, 380 U. S. 961. We affirm. Since petitioners do not argue that the trial judge misconceived or failed to apply the standards we first enunciated in *Roth v. United States*, 354 U. S. 476,³ the only serious question is whether those standards were correctly applied.⁴

In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York*, *post*, and as did the courts below, 224 F. Supp., at 134, 338 F. 2d, at 14-15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.⁵ The record in that regard amply supports the

³ We are not, however, to be understood as approving all aspects of the trial judge's exegesis of *Roth*, for example his remarks that "the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community." 224 F. Supp., at 137. Compare *Butler v. Michigan*, 352 U. S. 380.

⁴ The Government stipulated at trial that the circulars advertising the publications were not themselves obscene; therefore the convictions on the counts for mailing the advertising stand only if the mailing of the publications offend the statute.

⁵ Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics as a whole, including their edi-

decision of the trial judge that the mailing of all three publications offended the statute.⁶

The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter; and *The Housewife's Handbook on Selective Promiscuity* (hereinafter the *Handbook*), a short book. The issue of EROS specified in the indictment, Vol. 1, No. 4, contains 15 articles and photo-essays on the subject of love, sex, and sexual relations. The specified issue of Liaison, Vol. 1, No. 1, contains a prefatory "Letter from the Editors" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two articles concerning sex and sexual relations which had earlier appeared in professional journals and a report of an interview with a psychotherapist who favors the broadest license in sexual relationships. As the trial judge noted, "[w]hile the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit." 224 F. Supp., at 134. The *Hand-*

torial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting. Similarly, we accept the Government's concession, note 13, *infra*, that the prosecution rested upon the manner in which the petitioners sold the *Handbook*; thus our affirmance implies no agreement with the trial judge's characterizations of the book outside that setting.

⁶ It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end.

book purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes, and prefatory and concluding sections of the book elaborate, her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships. It was claimed at trial that women would find the book valuable, for example as a marriage manual or as an aid to the sex education of their children.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—"the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."⁷ EROS early sought mailing privilege from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal;⁸ the facilities of the

⁷ *Roth v. United States*, *supra*, 354 U. S., at 495 (WARREN, C. J., concurring).

⁸ Evidence relating to petitioners' efforts to secure mailing privileges from these post offices was, contrary to the suggestion of Mr. JUSTICE HARLAN in dissent, introduced for the purpose of supporting such a finding. Scienter had been stipulated prior to trial. The Government's position was revealed in the following colloquy, which occurred when it sought to introduce a letter to the postmaster of Blue Ball, Pennsylvania:

"The COURT. Who signed the letter?

"Mr. CREAMER. It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.

"The COURT. And your objection is—

"Mr. SHAPIRO. It is in no way relevant to the particular issue or publication upon which the defendant has been indicted

post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and Liaison thereafter mailed several million circulars soliciting subscriptions from that post office; over 5,500 copies of the *Handbook* were mailed.

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded an unrestricted license allowed by law in the expression of sex and sexual matters.⁹ The advertising for the

and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.

"The COURT. Anything else to say?

"Mr. CREAMER. If your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.

"The COURT. Admitted."

⁹ Thus, one EROS advertisement claimed

"Eros is a child of its times. . . . [It] is the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression. . . . EROS takes full advantage of this new freedom of expression. It is *the* magazine of sexual candor."

In another, more lavish spread:

"EROS is a new quarterly devoted to the subjects of Love and Sex. In a few short weeks since its birth, EROS has established itself as the rave of the American intellectual community—and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions ruling that

Handbook, apparently mailed from New York, consisted almost entirely of a reproduction of the introduction of the book, written by one Dr. Albert Ellis. Although he alludes to the book's informational value and its putative therapeutic usefulness, his remarks are preoccupied with the book's sexual imagery. The solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth.¹⁰ Inserted in each advertisement was a slip labeled "GUARANTEE" and reading, "Documentary Books, Inc. unconditionally guarantees full refund of the price of THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY if the book fails to reach you because of U. S. Post Office censorship interference." Similar slips appeared in the advertising for EROS and

a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of art.

"EROS is a genuine work of art"

An undisclosed number of advertisements for *Liaison* were mailed. The outer envelopes of these ads ask, "Are you among the chosen few?" The first line of the advertisement eliminates the ambiguity: "Are you a member of the sexual elite?" It continues:

"That is, are you among the few happy and enlightened individuals who believe that a man and woman can make love without feeling pangs of conscience? Can you read about love and sex and discuss them without blushing and stammering?"

"If so, you ought to know about an important new periodical called *Liaison*."

"In short, *Liaison* is Cupid's Chronicle"

"Though *Liaison* handles the subjects of love and sex with complete candor, I wish to make clear that it is not a scandal sheet and it is not written for the man in the street. *Liaison* is aimed at intelligent, educated adults who can accept love and sex as part of life.

" . . . I'll venture to say that after you've read your first bi-weekly issue, *Liaison* will be your most eagerly awaited piece of mail."

¹⁰ Note, 13, *infra*.

Liaison; they highlighted the gloss petitioners put on the publications, eliminating any doubt what the purchaser was being asked to buy.¹¹

This evidence, in our view, was relevant in determining the ultimate question of "obscenity" and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test.

A proposition argued as to *EROS*, for example, is that the trial judge improperly found the magazine to be obscene as a whole, since he concluded that only four of the 15 articles predominantly appealed to prurient interest and substantially exceeded community standards of

¹¹ There is much additional evidence supporting the conclusion of petitioners' pandering. One of petitioners' former writers for *Liaison*, for example, testified about the editorial goals and practices of that publication.

candor, while the other articles were admittedly non-offensive. But the trial judge found that "[t]he deliberate and studied arrangement of EROS is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of non-offensive material." 224 F. Supp., at 131. However erroneous such a conclusion might be if unsupported by the evidence of pandering, the record here supports it. EROS was created, represented and sold solely as a claimed instrument of the sexual stimulation it would bring. Like the other publications, its pervasive treatment of sex and sexual matters rendered it available to exploitation by those who would make a business of pandering to "the widespread weakness for titillation by pornography."¹² Petitioners' own expert agreed, correctly we think, that "[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion.

A similar analysis applies to the judgment regarding the *Handbook*. The bulk of the proofs directed to social importance concerned this publication. Before selling publication rights to petitioners, its author had printed it privately; she sent circulars to persons whose names appeared on membership lists of medical and psychiatric associations, asserting its value as an adjunct in therapy. Over 12,000 sales resulted from this solicitation, and a number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the

¹² Schwartz, *Morals Offenses and the Model Penal Code*, 63 Col. L. Rev. 669, 677 (1963).

book has worth in such a controlled, or even neutral, environment. Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence.¹³

The decision in *Rebhuhn v. United States*, 109 F. 2d 512, is persuasive authority for our conclusion.¹⁴ That was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that

¹³ The Government drew a distinction between the author's and petitioners' solicitation. At the sentencing proceeding the United States Attorney stated:

"... [the author] was distributing ... only to physicians; she never had widespread indiscriminate distribution of the Handbook and, consequently, the Post Office Department did not interfere ... If Mr. Ginzburg had distributed and sold and advertised these books solely to ... physicians ... we, of course, would not be here this morning with regard to The Housewife's Handbook ..."

¹⁴ The Proposed Official Draft of the ALI Model Penal Code likewise recognizes the question of pandering as relevant to the obscenity issue, § 251.4 (4); Tentative Draft No. 6 (May 6, 1957), at pp. 1-3, 13-17, 45-46, 53; *Schwartz, supra*, n. 12; see *Craig, Suppressed Books*, 195-206 (1963). Compare *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 496-497 (D. C. S. D. N. Y. 1959), *aff'd* 276 F. 2d 433 (C. A. 2d Cir. 1960); *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, 707 (C. A. 2d Cir. 1934), *affirming* 5 F. Supp. 182 (D. C. S. D. N. Y. 1933). See also *The Trial of Lady Chatterly—Regina v. Penguin Books, Ltd.* (Rolph. ed. 1961).

many of the books were entitled to the protection of the First Amendment, and "could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written. . . ." 109 F. 2d 514. But the evidence, as here, was that the defendants had not disseminated them for their "proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime." *Id.*, at 515. Speaking for the Court in affirming the conviction, Judge Learned Hand said:

" . . . [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose." 109 F. 2d 514-515.

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the ma-

terial in question and thus satisfy the *Roth* test.¹⁵ No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.¹⁶ Rather, the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests¹⁷ strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.¹⁸ A conviction for

¹⁵ Our conclusion is consistent with the statutory scheme. Although § 1461, in referring to "obscene . . . matter" may appear to deal with the qualities of material in the abstract, it is settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved. *United States v. Rebhuhn*, *supra*. Because the statute creates a criminal remedy, cf. *Manual Enterprises v. Day*, 370 U. S. 478, 495 (opinion of BRENNAN, J.), it readily admits such an interpretation, compare *United States v. 31 Photographs, etc.*, 156 F. Supp. 350 (D. C. S. D. N. Y. 1957).

¹⁶ See *New York Times v. Sullivan*, 376 U. S. 254, 265-266; *Smith v. California*, 361 U. S. 147, 150.

¹⁷ See *Valentine v. Christenson*, 316 U. S. 52, where the Court viewed handbills purporting to contain protected expression as merely commercial advertising. Compare that decision with *Jamison v. Texas*, 318 U. S. 413, and *Murdock v. Pennsylvania*, 319 U. S. 105, where speech having the characteristics of advertising was held to be an integral part of religious discussions and hence protected. Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech.

¹⁸ Compare *Breard v. Alexandria*, 341 U. S. 622, with *Martin v. Struthers*, 319 U. S. 141. Cf. *Kovacs v. Cooper*, 336 U. S. 77; *Giboney v. Empire Storage Co.*, 336 U. S. 490; *Coz v. Louisiana*, 379 U. S. 536, 559.

mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth*—a use inconsistent with any claim to the shelter of the First Amendment.¹⁹ "The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." *Roth v. United States*, 354 U. S., at 495 (WARREN, C. J., concurring).

It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

¹⁹ One who advertises and sells a work on the basis of its prurient appeal is not threatened by the perhaps inherent residual vagueness of the *Roth* test, cf. *Dombrowski v. Pfister*, 380 U. S. 479, 486-487, 491-492; such behavior is central to the objectives of criminal obscenity laws. ALI Model Penal Code, Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17; Comments to the Proposed Official Draft § 251.4, *supra*; Schwartz, *Morals Offenses and the Model Penal Code*, 63 Col. L. Rev. 669, 677-681 (1963); Paul & Schwartz, *Federal Censorship—Obscenity in the Mail*, 212-219 (1961); see *Mishkin v. New York*, *post*, at —, n. 5.

Petitioners raise several procedural objections, principally directed to the findings which accompanied the trial court's memorandum opinion, Fed. Rules Crim. Proc. 23. Even on the assumption that petitioners' objections are well taken, we perceive no error affecting their substantial rights.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 42.—OCTOBER TERM, 1965.

Ralph Ginzburg et al., Petitioners, v. United States.	} On Writ of Certiorari to the United States Court of Ap- peals for the Third Circuit.
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[March 21, 1966.]

MR. JUSTICE BLACK, dissenting.

Only one stark fact emerges with clarity out of the confusing welter of opinions and thousands of words written in this and two other cases today.¹ That fact is that Ginzburg, petitioner here, is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal. Since, as I have said many times, I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct), I agree with Part II of the dissent of my Brother DOUGLAS in this case, and I would reverse Ginzburg's conviction on this ground alone. Even assuming, however, that the Court is correct in holding today that Congress does have power to clamp official censorship on some subjects selected by the Court in some ways approved by it, I believe that the federal obscenity statute as enacted by Congress and as enforced by the Court against Ginzburg in this case should be held invalid on two other grounds.

¹ See No. 49, *Mishkin v. New York*, *post*, p. —, and No. 368, *Memoirs v. Massachusetts*, *ante*, p. —.

I.

Criminal punishment by government, although universally recognized as a necessity in limited areas of conduct, is an exercise of one of government's most awesome and dangerous powers. Consequently, wise and good governments make all possible efforts to hedge this dangerous power by restricting it within easily identifiable boundaries. Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance. To this end, at least in part, written laws came into being, marking the boundaries of conduct for which public agents could thereafter impose punishment upon people. In contrast, bad governments, either wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents at the moment of trial, or sometimes history tells us, wrote their laws in an unknown tongue so that people could not understand them or else placed their written laws at such inaccessible spots that people could not read them. It seems to me that these harsh expedients used by bad governments to punish people for conduct not previously clearly marked as criminal are being used here to put Mr. Ginzburg in prison for five years.

I agree with my Brother HARLAN that the Court has in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about, or if it did think about them certainly did not adopt them. Consequently, Ginzburg is, as I see it, having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. Such an affirmance we

have said violates due process. *Cole v. Arkansas*, 333 U. S. 196. Compare *Shuttlesworth v. Birmingham*, 382 U. S. 87. Quite apart from this vice in the affirmance, however, I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him. I shall separately discuss the three elements which a majority of the Court seems to consider material in proving obscenity.²

(a) The first element considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the prurient interest in sex. It seems quite apparent to me that human beings, serving either as judges or jurors, could

² As I understand all of the opinions in this case and the two related cases decided today, three things must be proven to establish material as obscene. In brief these are (1) the material must appeal to the prurient interest, (2) it must be patently offensive, and (3) it must have no redeeming social value. MR. JUSTICE BRENNAN in his opinion in *Memoirs v. Massachusetts*, ante, p. —, which is joined by THE CHIEF JUSTICE and MR. JUSTICE FORTAS, is of the opinion that all three of these elements must coalesce before material can be labeled obscene. MR. JUSTICE CLARK in a dissenting opinion in *Memoirs* indicates, however, that proof of the first two elements alone is enough to show obscenity and that proof of the third—the material must be utterly without redeeming social value—is only an aid in proving the first two. In his dissenting opinion in *Memoirs* MR. JUSTICE WHITE states that material is obscene “if its predominant theme appeals to the prurient interest in a manner exceeding the customary limits of candor.” In the same opinion MR. JUSTICE WHITE states that the social importance test “is relevant only to determining the predominant prurient interest of the material.”

not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror, would reach about whether the material appeals to "prurient interest in sex" would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or juror's personality, habits, inclinations, attitudes and other individual characteristics. In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.

(b) The second element for determining obscenity as it is described by my Brother BRENNAN is that the material must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters" Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court³ leaves me with any kind of certainty as to whether the "community standards" referred to are world-wide, nation-wide, section-wide, state-wide,

³ See the opinion of Mr. JUSTICE BRENNAN, concurred in by Mr. Justice Goldberg in *Jacobellis v. Ohio*, 378 U. S. 184, but compare the dissent in that case of THE CHIEF JUSTICE, joined by Mr. JUSTICE CLARK, at 199.

country-wide, precinct- or township-wide. But even if some definite areas were mentioned, who is capable of assessing "community standards" on such a subject? Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

(c) A third element which three of my Brethren think is required to establish obscenity is that the material must be "utterly without redeeming social value." This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is "utterly without redeeming social value" Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate

decision in his particular case by this Court whether certain material comes within the area of "obscenity" as that term is confused by the Court today. For this reason even if, as appears from the result of the three cases today, this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted.

I close this part of my dissent by saying once again that I think the First Amendment forbids any kind or type or nature of governmental censorship over views as distinguished from conduct.

II.

It is obvious that the effect of the Court's decisions in the three obscenity cases handed down today is to make it exceedingly dangerous for people to discuss either orally or in writing anything about sex. Sex is a fact of life. Its pervasive influence is felt throughout the world and it cannot be ignored. Like all other facts of life it can lead to difficulty and trouble and sorrow and pain. But while it may lead to abuses, and has in many instances, no words need be spoken in order for people to know that the subject is one pleasantly interwoven in all human activities and involves the very substance of the creation of life itself. It is a subject which people are bound to consider and discuss whatever laws are passed

by any government to try to suppress it. Though I do not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems. I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussions should not be made a crime.

I would reverse this case.

SUPREME COURT OF THE UNITED STATES

Nos. 42 AND 49.—OCTOBER TERM, 1965.

Ralph Ginzburg et al.,	}	On Writ of Certiorari to the United States Court of Ap- peals for the Third Circuit.
Petitioners,		
42 v. United States.		

Edward Mishkin,	}	On Appeal From the Court of Appeals of New York.
Appellant,		
49 v. State of New York.		

[March 21, 1966.]

MR. JUSTICE DOUGLAS, dissenting.

The use of sex symbols to sell literature, today condemned by the Court, engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyers' attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does its unostentatious inclusion in the average edition of the Bible.

I.

The Court has, in a variety of contexts, insisted that preservation of rights safeguarded by the First Amendment requires vigilance. We have recognized that a "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." *Dombrowski v. Pfister*, 380 U. S. 479, 486. Where uncertainty is the distinguishing characteristic of a legal principle—in this case the Court's "pandering" theory—"the free dissemination of ideas may be the loser." *Smith v. California*, 361 U. S. 147, 151. The Court today, however, takes the other course, despite the admonition in *Speiser v. Randall*, 357 U. S. 513, 525, that "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." Before today, due regard for the frailties of free expression led us to reject insensitive procedures¹ and clumsy, vague, or overbroad substantive rules even in the realm of obscenity.² For as the Court emphasized in *Roth v. United States*, 354 U. S. 476, 488, "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

Certainly without the aura of sex in the promotion of these publications their contents cannot be said to be

¹ *Marcus v. Search Warrant*, 367 U. S. 717; *A Quantity of Books v. Kansas*, 378 U. S. 205; *Freedman v. Maryland*, 380 U. S. 51.

² *Butler v. Michigan*, 352 U. S. 380; *Smith v. California*, 361 U. S. 147; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (opinion of HARLAN, J.).

"utterly without redeeming social importance." *Roth v. United States, supra*, at 484.³ One of the publications condemned today is the *Housewife's Handbook on Selective Promiscuity*, which a number of doctors and psychiatrists thought had clinical value. One clinical psychologist said: "I should like to recommend it, for example, to the people in my church to read, especially those who are having marital difficulties, in order to increase their tolerance and understanding for one another. Much of the book, I should think, would be very suitable reading for teen age people, especially teen age young women who could empathize strongly with the growing up period that Mrs. Rey [Anthony] relates, and could read on and be disabused of some of the unrealistic notions about marriage and sexual experiences. I should think this would make very good reading for the average man to help him gain a better appreciation of female sexuality."

The Rev. George Von Hilsheimer III, a Baptist minister,⁴ testified that he has used the book "insistently in

³ The Court's premise is that Ginzburg represented that his publications would be sexually arousing. The Court, however, recognized in *Roth*: "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest . . . i. e., a shameful or morbid interest in nudity, sex, or excretion . . ." *Id.*, 487 and n. 20 (emphasis added). The advertisements for these publications, which the majority quotes (*ante*, at —), promised candor in the treatment of matters pertaining to sex, and at the same time proclaimed that they were artistic or otherwise socially valuable. In effect, then, these advertisements represented that the publications are *not* obscene.

⁴ Rev. Von Hilsheimer obtained an A. B. at the University of Miami in 1951. He did graduate work in psychology and studied analysis and training therapy. Thereafter, he did graduate work as a theological student, and received a degree as a Doctor of Divinity from the University of Chicago in 1957. He had exten-

my pastoral counseling and in my formal psychological counseling:"

"The book is a history, a very unhappy history, of a series of sexual and psychological misadventures and the encounter of a quite typical and average American woman with quite typical and average American men. The fact that the book itself is the history of a woman who has had sexual adventures outside the normally accepted bounds of marriage which, of course for most Americans today, is a sort of serial polygamy, it does not teach or advocate this, but gives the women to whom I gave the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual, and that they themselves should not be guilty because they are, what they say, sexual failures."

I would think the Baptist minister's evaluation would be enough to satisfy the Court's test, unless the censor's word is to be final or unless the experts are to be weighed in the censor's scales, in which event one Anthony Comstock would too often prove more weighty than a dozen more detached scholars, or unless we, the ultimate Board of Censors, are to lay down standards for review that give the censor the benefit of the "any evidence" rule or the "substantial evidence" rule as in the administrative law field. Cf. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474. Or perhaps we mean to let the courts sift and choose among conflicting versions of the "redeeming social importance" of a particular book, making sure that they keep their findings clear of doubt lest we reverse, as we do today in *Putnam's Sons v. Massachusetts*, post,

sive experience as a group counselor, lecturer, and family counselor. He was a consultant to President Kennedy's Study Group on National Voluntary Services, and a member of the board of directors of Mobilization for Youth.

at —, because the lower court in an effort to be fair showed how two-sided the argument was. Since the test is whether the publication is "utterly without any redeeming social importance," then I think we should honor the opinion of the Baptist minister who testified as an expert in the field of counseling.

Then there is the newsletter *Liaison*. One of the defendant's own witnesses, critic Dwight Macdonald, testified that while, in his opinion, it did not go beyond the customary limits of candor tolerated by the community, it was "an extremely tasteless, vulgar, and repulsive issue." This may, perhaps, overstate the case, but *Liaison* is admittedly little more than a collection of "dirty" jokes and poems, with the possible exception of an interview with Dr. Albert Ellis. As to this material, I find wisdom in the words of the late Judge Jerome Frank:

"Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or alumni of our leading law schools, tales are told fully as 'obscene' as many of those distributed by men . . . convicted for violation of the obscenity statute. . . . 'One thinks of the lyrics sung . . . by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts.'"⁵

Liaison's appeal is neither literary nor spiritual. But neither is its appeal to a "morbid or shameful interest in nudity, sex, or excretion." The appeal is to the ribald sense of humor which is—for better or worse—a part of

⁵ *United States v. Roth*, 237 F. 2d 796, 822 and n. 58 (concurring opinion).

our culture. A mature society would not suppress this newsletter as obscene but would simply ignore it.

Then there is EROS. The Court affirms the judgment of the lower court, which found only four of the many articles and essays to be obscene. One of the four articles consisted of numerous ribald limericks, to which the views expressed as to *Liaison* would apply with equal force. Another was a photo essay entitled "Black and White in Color" which dealt with interracial love: a subject undoubtedly offensive to some members of our society. Critic Dwight Macdonald testified:

"I suppose if you object to the idea of a Negro and a white person having sex together, then, of course, you would be horrified by it. I don't. From the artistic point of view I thought it was very good. In fact, I thought it was done with great taste, and I don't know how to say it—I never heard of him before, but he is obviously an extremely competent and accomplished photographer."

Another defense witness, Professor Horst W. Janson, presently the Chairman of the Fine Arts Department at New York University, testified:

"I think they are outstandingly beautiful and artistic photographs. I can not imagine the theme being treated in a more lyrical and delicate manner than it has been done here.

"I might add here that of course photography in appropriate hands is an artistic instrument and this particular photographer has shown a very great awareness of compositional devices and patterns that have a long and well-established history in western art.

"The very contrast in the color of the two bodies of course has presented him with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts."

The third article found specifically by the trial judge to be obscene was a discussion by Drs. Eberhard W. and Phyllis C. Kronhausen of erotic writing by women, with illustrative quotations.⁶ The worth of the article was discussed by Dwight Macdonald, who stated:

"I thought [this was] an extremely interesting and important study with some remarkable quotations from the woman who had put down her sense of love-making, of sexual intercourse . . . in an extremely eloquent way. I have never seen this from the woman's point of view. I thought the point they made, the difference between the man's and the woman's approach to sexual intercourse was very well made and very important."

Still another article found obscene was a short introduction to and a lengthy excerpt from *My Life and Loves* by Frank Harris, about which there is little in the record. Suffice to say that this seems to be a book of some literary stature. At least I find it difficult on this record to say that it is "utterly without redeeming social importance."⁷

⁶ The Kronhausens wrote *Pornography and the Law* (1959).

⁷ The extensive literary comment which the book's publication generated demonstrates that it is not "utterly without redeeming social importance." See, e. g., *New York Review of Books*, p. 6 (Jan. 9, 1964); *New Yorker*, pp. 79-80 (Jan. 4, 1964); *Library Journal*, pp. 4743-4744 (Dec. 15, 1963); *New York Times Book Review*, p. 10 (Nov. 10, 1963); *Time*, pp. 102-104 (Nov. 8, 1963); *Newsweek*, pp. 98-100 (Oct. 28, 1963); *New Republic*, pp. 23-27 (Dec. 28, 1963).

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated.* Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutic value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly

* See Krafft-Ebing, *Psychopathia Sexualis*, p. 89 *et seq.* (1893); Eisler, *Man Into Wolf*, p. 23 *et seq.* (1951); Stekel, *Sadism and Masochism* (1929) *passim*; Bergler, *Principles of Self-Damage* (1959) *passim*; Reik, *Masochism in Modern Man* (1941) *passim*.

without any redeeming social importance"? "Redeeming" to whom? "Importance" to whom?

We took quite a different stance in *One, Inc. v. Olesen*, 355 U. S. 371, where we unanimously reversed the decision of the Court of Appeals in 241 F. 2d 772 without opinion. Our holding was accurately described by Lockhart and McClure, *Obscenity Censorship: The Core Constitutional Issue—What Is Obscene?* 7 Utah L. Rev. 289, 293 (1961):

"[This] was a magazine for homosexuals entitled *One—The Homosexual Magazine*, which was definitely not a scientific or critical magazine, but appears to have been written to appeal to the tastes and interests of homosexuals."⁹

⁹ The Court of Appeals summarized the contents as follows:

"The article 'Sappho Remembered' is the story of a lesbian's influence on a young girl only twenty years of age but 'actually nearer sixteen in many essential ways of maturity,' in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her roommate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

"The poem 'Lord Samuel and Lord Montagu' is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing round the drains' of Piccadilly (London). . . .

"The stories 'All This and Heaven Too,' and 'Not Til the End,' pages 32-36, are similar to the story 'Sappho Remembered,' except that they relate to the activities of the homosexuals rather than lesbians." 241 F. 2d 772, 777, 778.

There are other decisions of ours which also reversed judgments condemning publications catering to a wider range of literary tastes

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance?" Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires, as I suggest in my separate opinion in *Putnam's Sons v. Massachusetts, ante*, at —. How can we know that this expression may not *prevent* anti-social conduct?

I find it difficult to say that a publication has no "social importance" because it caters to the taste of the most unorthodox amongst us. We members of this Court should be among the last to say what should be orthodox in literature. An omniscience would be required which few in our whole society possess.

II.

This leads me to the conclusion, previously noted, that the First Amendment allows all ideas to be expressed—whether orthodox, popular, off-beat, or repulsive. I do not think it permissible to draw lines between

than we seem to tolerate today. See, e. g., *Mounce v. United States*, 355 U. S. 180, vacating and remanding 247 F. 2d 148 (nudist magazines); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, reversing 249 F. 2d 114 (nudist magazine); *Tralins v. Gerstein*, 378 U. S. 576, reversing 151 So. 2d 19 (book titled "Pleasure Was My Business" depicting the happenings in a house of prostitution); *Grove Press v. Gerstein*, 378 U. S. 577, reversing 156 So. 2d 537 (book titled "Tropic of Cancer" by Henry Miller).

the "good" and the "bad" and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted "reasonable" regulations of freedom of expression, as do the constitutions of some nations,¹⁰ we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one's time poring over government bulletins, political tracts, or theological treatises. The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas.

I think this is the ideal of the Free Society written into our Constitution. We have no business acting as censors or endowing any group with censorship powers. It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.

¹⁰ See, e. g., Constitution of the Union of Burma, Art. 17 (i), reprinted in I Peaslee, *Constitutions of Nations*, p. 281 (2d ed. 1956); Constitution of India, Art. 19 (2), II Peaslee, *op. cit. supra*, at p. 227; Constitution of Ireland, Art. 40 (6) (1) (i), II Peaslee, *op. cit. supra*, at p. 458; Federal Constitution of the Swiss Confederation, Art. 55, III Peaslee, *op. cit. supra*, at p. 344; Constitution of Libya, Art. 22, I Peaslee, *Constitutions of Nations*, p. 438 (3d ed. 1965); Constitution of Nigeria, Art. 25 (2), I Peaslee, *op. cit. supra*, at p. 605; Constitution of Zambia, Art. 22 (2), I Peaslee, *op. cit. supra*, at pp. 1040-1041.

SUPREME COURT OF THE UNITED STATES

No. 42.—OCTOBER TERM, 1965.

Ralph Ginzburg et al., Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Third Circuit.
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[March 21, 1966.]

MR. JUSTICE HARLAN, dissenting.

I would reverse the convictions of Ginzburg and his three corporate co-defendants. The federal obscenity statute under which they were convicted, 18 U. S. C. § 1461 (1964 ed.), is concerned with unlawful shipment of "nonmailable" matter. In my opinion announcing the judgment of the Court in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, the background of the statute was assessed, and its focus was seen to be solely on the character of the material in question. That too has been the premise on which past cases in this Court arising under this statute, or its predecessors, have been decided. See, e. g., *Roth v. United States*, 354 U. S. 476. I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only "hard-core pornography," see my separate opinion in *Roth*, *supra*, at 507, and my dissenting opinion in *A Book Named "John Cleland's Memoirs" v. Attorney General*, *ante*, p. —. Because I do not think it can be maintained that the material in question here falls within that narrow class, I do not believe it can be excluded from the mails.

The Court recognizes the difficulty of justifying these convictions; the majority refuses to approve the trial judge's "exegesis of *Roth*" (note 3, *ante*, p. 2); it declines to approve the trial court's "characterizations" of

the Handbook "outside" the "setting" which the majority for the first time announces to be crucial to this conviction (note 5, *ante*, p. 3). Moreover, the Court accepts the Government's concession that the Handbook has a certain "worth" when seen in something labeled a "controlled, or even neutral, environment" (*ante*, p. 9); the majority notes that these are "publications which we have assumed . . . cannot themselves be adjudged obscene in the abstract" (*ante*, p. 11). In fact, the Court in the last analysis sustains the convictions on the express assumption that the items held to be obscene are not, viewing them strictly, obscene at all (*ante*, p. 2).

This curious result is reached through the elaboration of a theory of obscenity entirely unrelated to the language, purposes, or history of the federal statute now being applied, and certainly different from the test used by the trial court to convict the defendants. While the precise holding of the Court is obscure, I take it that the objective test of *Roth*, which ultimately focuses on the material in question, is to be supplemented by another test that goes to the question whether the mailer's aim is to "pander" to or "titillate" those to whom he mails questionable matter.

Although it is not clear whether the majority views the panderer test as a statutory gloss or as constitutional doctrine, I read the opinion to be in the latter category.¹ The First Amendment, in the obscenity area, no longer fully protects material on its face nonobscene, for such material must now also be examined in the light of the defendant's conduct, attitude, motives. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected mate-

¹ The prevailing opinion in *A Book Named "John Cleland's Memoirs" v. Attorney General*, *ante*, p. —, makes clearer the constitutional ramifications of this new doctrine.

rial just because a jury or a judge may not find him or his business agreeable. Were a State to enact a "panderer" statute under its police power, I have little doubt that—subject to clear drafting to avoid attacks on vagueness and equal protection grounds—such a statute would be constitutional. Possibly the same might be true of the Federal Government acting under its postal or commerce powers. What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a straightforward 101-year-old statute (see 13 Stat. 507) is for me an astonishing piece of judicial improvisation.

It seems perfectly clear that the theory on which these convictions are now sustained is quite different from the basis on which the case was tried and decided by the District Court and affirmed by the Court of Appeals.² The District Court found the Handbook "patently offensive on its face" and without "the slightest redeeming social, artistic or literary importance or value"; it held that there was "no credible evidence that the Handbook has the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." 224 F. Supp. 129, 131. The trial court made similar findings as to *Eros* and *Liaison*. The majority's opinion, as I read it, casts doubts upon these explicit findings. As to the Handbook, the Court interprets an off-hand remark by the government prosecutor at the sentencing hearing as a "concession," which the majority accepts, that the prosecution rested upon the conduct of the petitioner, and the Court explicitly refuses

² Although at one point in its opinion the Court of Appeals referred to "the shoddy business of pandering," 338 F. 2d 12, 15, a reading of the opinion as a whole plainly indicates that the Court of Appeals did not affirm these convictions on the basis on which this Court now sustains them.

to accept the trial judge's "characterizations" of the book, which I take to be an implied rejection of the findings of fact upon which the conviction was in fact based (note 5, *ante*, p. 3). Similarly as to Eros, the Court implies that the finding of obscenity might be "erroneous" were it not supported "by the evidence of pandering" (*ante*, p. 8). The Court further characterizes the Eros decision, aside from pandering, as "an otherwise debatable conclusion" (*ante*, p. 8).

If there is anything to this new pandering dimension to the mailing statute, the Court should return the case for a new trial, for petitioners are at least entitled to a day in court on the question on which their guilt has ultimately come to depend. Compare the action of the Court in *A Book Named "John Cleland's Memoirs" v. Attorney General*, *ante*, p. —, also decided today, where the Court affords the State an opportunity to prove in a subsequent prosecution that an accused purveyor of "Fanny Hill" in fact used pandering methods to secure distribution of the book.

If a new trial were given in the present case, as I read the Court's opinion, the burden would be on the Government to show that the motives of the defendants were to pander to "the widespread weakness for titillation by pornography" (*ante*, p. 8). I suppose that an analysis of the type of individuals receiving Eros and the Handbook would be relevant. If they were ordinary people, interested in purchasing Eros or the Handbook for one of a dozen personal reasons, this might be some evidence of pandering to the general public. On the other hand, as the Court suggests, the defendants could exonerate themselves by showing that they sent these works only or perhaps primarily (no standards are set) to psychiatrists and other serious-minded professional people. Also relevant would apparently be the nature of the mailer's advertisements or representations. Con-

ceivably someone mailing to the public selective portions of a recognized classic with the avowed purpose of titillation would run the risk of conviction for mailing nonmailable matter. Presumably the Post Office under this theory might once again attempt to ban Lady Chatterley's Lover, which a lower court found not bannable in 1960 by an abstract application of *Roth*. *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433. I would suppose that if the Government could show that Grove Press is pandering to people who are interested in the book's sexual passages and not in D. H. Lawrence's social theories or literary technique § 1461 could properly be invoked. Even the well-known opinions of Judge A. N. Hand in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, and of Judge Woolsey in the District Court, 5 F. Supp. 182, might be rendered nugatory if a mailer of *Ulysses* is found to be titillating readers with its "coarse, blasphemous, and obscene" portions, 72 F. 2d, at 707, rather than piloting them through the intricacies of Joyce's stream of consciousness.

In the past, as in the trial of these petitioners, evidence as to a defendant's conduct was admissible only to show relevant intent.³ Now evidence not only as to conduct,

³ To show pandering, the Court relies heavily on the fact that the defendants sought mailing privileges from the postmasters of Inter-course and Blue Ball, Pennsylvania, before settling upon Middlesex, New Jersey, as a mailing point (*ante*, pp. 4-5). This evidence was admitted, however, only to show required scienter, see 338 F. 2d 12, 16. On appeal to the Court of Appeals and to this Court, appellant Ginzburg asserted that at most the evidence shows the intent of appellant Eros Magazine, Inc., and was erroneously used against him. The Court of Appeals held the point *de minimis*, 338 F. 2d, at 16-17, on the ground that the parties had stipulated the necessary intent. The United States, in its brief in this Court, likewise viewed this evidence as relating solely to *scienter*; nowhere did the United States attempt to sustain these convictions on anything like a pandering theory.

but also as to attitude and motive, is admissible on the primary question of whether the material mailed is obscene. I have difficulty seeing how these inquiries are logically related to the question whether a particular work is obscene. In addition, I think such a test for obscenity is impermissibly vague, and unwarranted by anything in the First Amendment or in 18 U. S. C. § 1461.

I would reverse the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 42.—OCTOBER TERM, 1965.

Ralph Ginzburg et al., Petitioners, v. United States.	} On Writ of Certiorari to the United States Court of Ap- peals for the Third Circuit.
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[March 21, 1966.]

MR. JUSTICE STEWART, dissenting.

The petitioner has been sentenced to five years in prison for sending through the mail copies of a magazine, a pamphlet, and a book. There was testimony at his trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's.

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which

our Constitution has committed us, it is for each to choose for himself.¹

Because such is the mandate of our Constitution, there is room for only the most restricted view of this Court's decision in *Roth v. United States*, 354 U. S. 476. In that case the Court held that "obscenity is not within the area of constitutionally protected speech or press." *Id.*, at 485. The Court there characterized obscenity as that which is "utterly without redeeming social importance," *id.*, at 484, "deals with sex in a manner appealing to prurient interest," *id.*, at 487, and "goes substantially beyond customary limits of candor in description or representation of such matters." *Id.*, at 487, n. 20.² In *Manual Enterprises v. Day*, 370 U. S. 478, I joined Mr. JUSTICE HARLAN's opinion adding "patent indecency" as a further essential element of that which is not constitutionally protected.

There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-

¹ Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e. g., *Breard v. Alexandria*, 341 U. S. 622; *Public Utilities Commission of the District of Columbia v. Pollak*, 343 U. S. 451; *Griswold v. Connecticut*, 381 U. S. 479. Still other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case.

² It is not accurate to say that the *Roth* opinion "fashioned standards" for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U. S., at 481, n. 8. And in no subsequent case has a majority of the Court been able to agree on any such "standards."

core pornography, without trying further to define it. *Jacobellis v. Ohio*, 378 U. S. 184, at 197 (concurring opinion). In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have reference.³ See also Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 63-64.

Although arguments can be made to the contrary, I accept the proposition that the general dissemination of matter of this description may be suppressed under valid laws.⁴ That has long been the almost universal judgment of our society. See *Roth v. United States*, 354 U. S., at 485. But material of this sort is wholly different from the publications mailed by the petitioner in the present case, and different not in degree but in kind.

The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment. But, the Court says, Ginzburg can still be sentenced to five years in prison for mailing them. Why? Because, says the Court, he was guilty of "com-

³ " . . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

⁴ During oral argument we were advised by government counsel that the vast majority of prosecutions under this statute involve material of this nature. Such prosecutions usually result in guilty pleas and never come to this Court.

mercial exploitation," of "pandering," and of "titillation." But Ginzburg was not charged with "commercial exploitation"; he was not charged with "pandering"; he was not charged with "titillation." Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny him due process of law. *Cole v. Arkansas*, 333 U. S. 196. But those grounds are *not*, of course, otherwise valid. Neither the statute under which Ginzburg was convicted nor any other federal statute I know of makes "commercial exploitation" or "pandering" or "titillation" a criminal offense. And any criminal law that sought to do so in the terms so elusively defined by the Court would, of course, be unconstitutionally vague and therefore void. All of these matters are developed in the dissenting opinions of my Brethren, and I simply note here that I fully agree with them.

For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to *G. P. Putnam Sons*.⁵ In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother.

I dissent.

⁵ See *Memoirs v. Massachusetts*, — U. S. —, decided today.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

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No. 42
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RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS
MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

—
ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT
—

PETITION FOR REHEARING

—
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PETITION FOR REHEARING

Preliminary Statement

A majority of the Court has concluded that it is constitutionally permissible to establish "obscenity" by considering the manner in which publications are advertised and sold although "standing alone, the publications themselves might not be obscene" (slip op., p. 2), and that a violation of the federal mailing statute can be established on this theory. Petitioners do not seek reconsideration of these rulings.¹ However, petitioners have never been heard on how these rulings are to be applied to them. Due process requires at least that much.

I

Statutes are not immutable. They can be amended by the legislature and new meaning can be imparted

¹ We understand that *amici* may address themselves to broader issues. If rehearing is granted, we would also deal with these issues unless the Court directs otherwise.

to them by judicial construction or reconstruction. But until March 21, 1966, neither the language of 18 U.S.C. § 1461 nor the opinions of this Court gave the slightest warning that the fact that the mailer "pandered" was material or even relevant in determining the obscenity of the publications that he mailed.²

Roth held that the federal mailing statute, when "applied according to the proper standard for judging obscenity [as delineated by the majority there] give[s] adequate warning of the conduct proscribed * * *." 354 U.S. 476, 491.³ Petitioners' reliance on

² The *Roth* majority adopted a "standard for judging obscenity" (354 U.S., at 491) which gave no consideration to a defendant's commercial motives or to the manner in which his material was advertised. The Chief Justice, concurring in the result, but not in the majority's reasoning, urged adoption of a variable standard under which the challenged materials would be judged in the context of the defendant's conduct (354 U.S., at 495-496). The fact that a defendant had engaged in the "commercial exploitation of the morbid and shameful craving for material with prurient effect" would, in his then expressed view, be relevant and perhaps decisive. That view found no other adherent until *Jacobellis*, when the Chief Justice was joined by Mr. Justice Clark in a dissenting opinion (378 U.S., at 199). In that case, he urged that the motion picture be judged in the light of its advertising (378 U.S., at 201, fn. 2). No other member of the Court considered the manner in which the film was advertised as relevant and Mr. Justice Goldberg specifically rejected it as irrelevant. 378 U.S., at 198.

³ Surely a defendant is not obliged to defend against a prosecutor's construction of a statute rather than its prior interpretations by this Court. But even if such a burden was placed upon petitioners, they never received fair warning that the prosecutor was relying on the theory on which they have now been found guilty.

The indictment charged that the publications were obscene on their face, and the mailings of advertisements were pleaded as separate offenses, not as elements of the obscenity of the publications (R. 6-13). The Government stipulated in lieu of a bill of particulars that the indictment "charged that [each of] the non-mailable [publications] is obscene when considered as a whole." Again

Roth is self-evident. As the Court points out (slip

there was no reference to the manner in which the publications were advertised or promoted.

In opposing petitioners' motion to dismiss the indictment, the Government stated that its "position is that the standard or test of obscenity which will ultimately be applied to the materials herein is the test set forth in *Manual Enterprises v. Day* * * * ; *Roth v. United States* * * * ; and *Grove Press, Inc. v. Christenberry* * * * ." (Government's Brief in Opposition to Defendants' Motion to Quash Indictment Etc., p. 6.)

Certainly petitioners cannot have been required to do more than defend against the crime for which they were indicted (see *infra*, pp. 8-9). But even assuming that an indictment is freely amendable during the course of trial, petitioners still did not receive fair warning that they were being tried on the theory on which this Court has found them guilty. Contrary to the Court's supposition (slip op., 3, fn. 6), when the prosecutor urged the admissibility of evidence of "intent" (R. 152, 154-155, 169), he was embellishing scienter, not proving obscenity. This is clear from the colloquy that preceded the taking of such evidence:

"Mr. Shapiro: We propose to stipulate that the defendants did knowingly mail or cause to be mailed 'Liaison,' fully knowing the contents thereof, and we will stipulate that issue on the record. I am doing that in order to try to speed up the trial.

Do you have any objections to that stipulation, Mr. Creamer?

Mr. Creamer: I have no objection, Your Honor, but I reserve the right to put on any evidence as to intent that I feel fit to put on." (R. 152).

The trial court understood that such evidence was not offered to establish obscenity and its conclusion that the works were obscene did not turn upon the manner of their promotion and advertising (R. 351-353, 360-367). A claim of error based upon misattribution of this evidence of "intent" was denied by the court below on the ground that scienter had been stipulated (R. 392); and the Solicitor General took the same position in this Court (Brief in Opposition, p. 11).

Had petitioners been aware that evidence as to the mode of distribution would be used to establish obscenity, they would have certainly introduced evidence in refutation, and as we point out below, *infra*, pp. 5-7, such evidence was available in abundance. The fact that it was not offered, argues in the strongest terms that petitioners were in no way apprised of its relevancy to any contested issue in this case.

op., 5, ftn. 9), in announcing publication of Eros, petitioners advertised it to be "the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression." Now it would appear that the "adequate warning" of *Roth* has become a trap for those who fairly read it as an invitation to exercise First Amendment freedoms.⁴

In *Bouie v. City of Columbia*, 378 U.S. 347, this Court held that "when an unforeseeable [judicial] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime" (*id.*, at 354-355). Cf. *James v. United States*, 366 U.S. 213 (opinion of Warren, C.J.). A rule of law which prohibits South Carolina under the Fourteenth Amendment from giving retroactive effect to an unforeseeable judicial construction of a criminal statute should apply with equal vigor to the federal government under the Fifth.

In *James v. United States*, 366 U.S. 213, it was held that conduct consistent with the Court's prior interpretation of a criminal statute could not be the basis for a conviction under the statute as subsequently construed. The Chief Justice, joined by Justices Brennan and Stewart, would have dismissed the in-

⁴ "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals," *McBoyle v. United States*, 283 U.S. 25, 27, avid attention has been paid to the prior pronouncements of this Court proclaiming what was and what was not constitutionally protected conduct in the dissemination of works dealing with sex. If persons cannot rely on the opinions of this Court defining the range of permissible expression, that very fact "may inhibit the full exercise of First Amendment freedoms." *Dombrowski v. Pfister*, 380 U.S. 479, 486.

dictment (*id.*, at 222), whereas Justice Harlan and Frankfurter would have remanded for a new trial (*id.*, at 241), but all five shared the view that the new interpretation had to be established "in a manner that [would] not prejudice those who might have relied on [the] old one." 366 U.S., at 221, 242.⁵ And this Court has repeatedly held that even in a civil case, a party who relies on a reasonable interpretation of the opinions of the highest court in the jurisdiction will not be left without an opportunity to be heard should such reliance prove to be misplaced. *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co.*, 382 U.S. 231; *England v. Board of Medical Examiners*, 375 U.S. 411, 421; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678-679. If these rules are applied here, petitioners should at the very least be afforded a new trial.

If a new trial is granted in this case, the ultimate factual determination would be based upon a record quite different from that which the Court has read as establishing that petitioners were engaged in the sordid business of pandering to a shameful craving for material with prurient effect (slip op., 3-7).

Petitioners would show that their mailing lists were selected to reach persons with an interest in art, science, or literature, not smut. It is unlikely that one would find or seek out persons with a craving for material with prurient effect among subscribers to such magazines as the *Bulletin of Atomic Scientists*, the

⁵ Mr. Justice Clark voted to affirm the conviction because in his view the proof showed that petitioners had not placed a bona fide reliance on the prior opinions of the Court (366 U.S., at 241). Cf. *Ginzburg v. United States*, slip op., 5, fn. 9.

Saturday Review or American Heritage, ticket buyers to the American Shakespeare Festival, or members of the American Medical Association, American Dental Association and American Bar Association. Yet these were typical of the mailing lists used by Eros. In the light of its intended audience, the Eros advertisement (Ex. G-10, R. 171) takes on quite a different cast from that suggested by the Court (slip op., 5, ftn. 9).

Advertisements for the Handbook were mailed in an envelope which bore the inscription "A Message from an Eminent Psychotherapist" (Ex. G-4, R. 171). This advertisement was sent to those on such mailing lists as the American Psychological Association, the American Psychoanalytic Society, general practitioners of medicine, and members of the American Bar Association. The advertisement consisted of a dignified reprint of the book's preface by Dr. Albert Ellis which recommends it to "the library of every serious researcher and professional worker in the field of sex, love, marriage, and family relations." It simply cannot be read as an appeal to a shameful craving for material with prurient effect, unless one assumes that it was intentionally mailed to salivating adolescents (slip op., 6), which it was not. The full refund "Guarantee" against postal interference was not inserted to heighten prurient interest as the Court suggests (slip op., 6), but because the Postmaster had threatened to impound the books if they were sent through the mail, a threat subsequently carried out. Among those who ordered the Handbook but did not receive it because of "postal interference" were the Veterans Administration Hospital, Lexington, Kentucky, the Psychiatric Service of the Federal Correctional Institution, Lompoc, California, the Ohio State Department

of Mental Hygiene, the Psychiatric Institute of Columbia University, and many other government institutions and universities. The roster of those who purchased petitioners' publications consists predominantly of professionals and intellectuals, and underscores both the intended audience and the non-prurient appeal of the material itself. To such an audience, publications with "sexual candor" offer truth—not smut.

Given the opportunity, petitioners would show that they mailed from Middlesex, New Jersey, not because of its name (slip op., 5), but because it was the location of the largest and best equipped mail-order facility in the eastern United States, and the Blue Ball and Intercourse letters (Exs. G, 1-2, R. 155, 157), still incorrectly attributed to petitioner Ginzburg (slip op., 4; see Pet. Br., 58-60), would be shown to be the idea and product of a member of Eros' staff.

Petitioner Ginzburg would testify that he discharged the writer of the first issue of *Liaison* (the one involved here) because his work was sophomoric and in bad taste. Subsequent issues of *Liaison* would be introduced to show how radical was the change that then took place. Petitioners would establish the credentials and caliber of the artists and writers who were engaged in the creation of their publications and these artists and writers would testify as to their understanding of the type of publications they were asked to create.

Within the context of the foregoing facts, the evidence held to establish pandering would, we submit, not prove that at all. But that is not the question before the Court. The question here is whether petitioners are to be afforded an opportunity to defend with knowledge of the standard by which their conduct is to be judged.

II

If petitioners are to be denied their day in court on the question on which their guilt has ultimately come to depend, it can only be because *Rebhuhn v. United States*, 109 F. 2d 512, a case decided long before *Roth*, (1) provided "adequate warning" and (2) "settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved" (slip op., 11, ftn. 15). The *Rebhuhn* decision was not, however, cited by the Government during the course of this litigation and was never dealt with by petitioners. If it had been raised, there would have been every reason to believe that it had been devitalized by this Court's decision in *Roth*. If it is now to be the basis of sustaining the petitioners' convictions, its limitation no less than its scope, should be respected in the case at bar. The vital limitation, in our view, is that the *Rebhuhn* defendants were charged not with mailing obscene books but "only under that part of the statute which forbids sending information of where obscene writings can be obtained" (109 F. 2d., at 514).⁶ The counts on which the convictions were there sustained thus gave the *Rebhuhn* defendants notice that the mode of distribution of the publications was the essence of the charge.

⁶ There were fifteen counts in that indictment: thirteen were for depositing in the mail circulars advertising obscene books; the fourteenth was for advertising by mail where obscene books could be obtained; and the fifteenth was for conspiracy to mail both circulars and advertising in violation of the statute. See Record, Vol. I, pp. 15-82 and Brief for the United States in Opposition, pp. 3-4, in *Rebhuhn v. United States*, 310 U.S. 629 (No. 859, Oct. T. 1939).

Since petitioner Ginzburg was sentenced to imprisonment on the book mailing counts alone,⁷ the distinction is of fundamental importance to the disposition of this case. It also is of first importance to all future prosecutions involving the application of this Court's interpretation of the statute. For such a disposition will assure that when the nature of the distribution of material, rather than only its contents, is relevant to the accusation of obscenity, the distribution will have been alleged in the indictment and the personal responsibility of defendants for such distribution proved beyond a reasonable doubt. *In re Oliver*, 333 U.S. 257, 273-276; *Russell v. United States*, 369 U.S. 749; *Stirone v. United States*, 361 U.S. 212. This alone would go far toward dispelling a book publisher's fear that he might be implicated in crime because of the manner in which a seller promotes the book.

Modification of the judgment limiting affirmance to the advertising counts would plainly serve the purpose of this Court's decision to close the mail to those who engage in the "sordid business of pandering". It would, however, serve that purpose without sacrificing fundamental values by assuring proper notice of the basis of the crime charged. And as applied to this case, it would have the added virtue of eliminating a sentence of imprisonment based upon findings that the publications here involved were obscene *per se* (see Findings 7, 9, 10, 14, 19, R. 352-353)—findings which this Court has not sustained. *Cole v. Arkansas*, 333 U.S. 196.

⁷ The sentence of imprisonment was imposed on those counts of the indictment which referred to the mailing of obscene publications. Petitioner Ginzburg was fined \$1,000 on each of the ten advertising counts, and the corporate petitioners were fined \$500 on each such count (R. 380-384).

Conclusion

Under the circumstances of this case, the five-year sentence meted out to petitioner Ginzburg should not stand. Whether it is appropriate to reverse the convictions, or remand for a new trial, or affirm limited to the advertising counts alone, need not now be decided by the Court. The only thing which need be decided now is whether this petition, presenting as it does, important questions never before briefed or argued, is sufficiently compelling to warrant consideration.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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IN THE
Supreme Court of the United States

October Term, 1965.

No. 42.

RALPH GINZBURG, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

**BRIEF AMICUS CURIAE OF THE BUREAU OF
INDEPENDENT PUBLISHERS AND
DISTRIBUTORS IN SUPPORT OF
PETITION FOR REHEARING.**

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**BRIEF AMICUS CURIAE OF THE BUREAU
OF INDEPENDENT PUBLISHERS AND
DISTRIBUTORS IN SUPPORT OF
PETITION FOR REHEARING.**

INTEREST OF THE AMICUS CURIAE.

The Bureau of Independent Publishers and Distributors is a nationwide association. Its membership embraces both publishers and national distributors of magazines and paperback books. The magazines include virtually all the popular periodicals, such as *Life*, *The Ladies' Home Journal*, *Readers' Digest*, *Fortune* and the *New Republic*, among many others; while the books include a spectrum of titles from *The Bible*, Dante and Dickens to *Ulysses*, *Lady Chatterley's Lover* and Margaret Mead. The members of the association handle more than half the volume

of publishing and distributing of such publications to newsstands and other retail outlets throughout the United States.¹ The Bureau views with grave concern the new exception carved by the majority opinion in No. 42 in the protection the First Amendment affords those who publish and distribute as well as their reader customers. Such concern necessarily becomes greater as the standard imposed by the Constitution upon the overzealous prosecutor and the self-appointed "morals" vigilante becomes more vague.

The Bureau and its members have a direct interest in the ruling of the majority in this case and it is an interest which did not exist until the decision itself revealed that a novel standard had been laid down. So long as the issues in the case were simply those passed upon by the two courts below, the Bureau's interest was only peripheral. For, while judges and individuals might differ as to the existence of redeeming social importance or prurient appeal, the finding that a given work was obscene on its face would be limited to the work itself. This Court's mature and reasoned articulation of the scope of obscenity in cases² dealing with varied works on their face would have restrained the censor and the vigilante even if the Court had agreed with the trial judge and found any of the three works mailed by defendant Ginzburg obscene.³ The startling rationale actually adopted by the majority opens Pandora's box, and does so as much by the way the result was reached as by the result itself.

1. The Bureau's members have never handled the distribution of the works involved in No. 42, which sold by mail, nor those involved in No. 49, a companion case, which sold through Appellants own store.

2. E.g., *Memoirs v. Massachusetts*, 34 U. S. L. Week 4236 (decided March 21, 1966) (*Fanny Hill*); *Grove Press v. Gerstein*, 378 U. S. 577 (*Tropic of Cancer*); *Jacobellis v. Ohio*, 378 U. S. 184 (Movie "The Lovers"); see *Grove Press v. Christenberry*, 276 F. 2d 433 (2d Cir. 1960) (*Lady Chatterley's Lover*).

3. Thus we have no quarrel with the Court's straightforward opinion and judgment in No. 49, except as it relies on the instant case.

It is this unforeseen novelty and the very real threat of unjustified oppression it poses which prompts the Bureau to ask this Court to listen to its views. If such a request might be belated in an ordinary case, it is not so here, for this is a most extraordinary case indeed.

Defendant Ginzburg was both a publisher and a distributor, and unless vacated the novel resolution of his fate by this Court will inevitably have a far-reaching negative effect on all publishers and distributors, their businesses and the community they serve.

All parties consent to the filing of this *Brief Amicus Curiae*.

ARGUMENT.**I. Introduction.**

On February 14 of this year a Russian trial court in Moscow sentenced a man to five years in prison for writing a book and another to seven years for the same offense. The contents of the book had been found by the court to violate express statutory prohibitions. A month later on March 21 this Court affirmed a conviction which likewise sentenced a man to five years in prison for mailing the writings of others. In contrast to the Russian court, this Court assumed that the contents of these publications did not violate any statutory prohibition. The Russian authors were accused, and after full defense with counsel, convicted of uttering overt statements which endangered the state. The defendant Ginzburg, in dramatic contrast, was left subject to five years imprisonment (without opportunity to defend: nothing in the statute, indictment or charge informed him of the new crime this Court would create) on the sole basis of the criterion—not of having a “dirty mind”—but, if we read the majority’s opinion right, of acting upon what the majority believed to be a *cynical view* of the “dirty minds” of others. This criterion was first announced in the very opinion which precluded any defense unless rehearing is granted.

II. The New Criterion.

In addition to affirming the “stark fact” of Ginzburg’s sentence,⁴ the majority in this case attempts to lay down for the future a new criterion for judging criminality in the publication or distribution of printed matter under the Federal and inevitably under the State statutes. This criterion is disastrously vague and consequently dangerously oppressive. It must be reconsidered.

4. Which constituted a retroactive application of the new standard of guilt.

In Russia the publication and distribution of literature is rigidly controlled by the state. Therefore "free speech" cases there occur at the basic level of the author's personal utterance. In our free and more complex society, in contrast, the issue of "free speech" invariably arises in the context of publication or distribution.⁵

In such a context the issues of free speech are both more subtly complex and, we submit, more important than in the area of an individual artist's conscience. Artists from Socrates to Andrei Sinyavsky have knowingly and willingly courted disaster as the price of honesty in their speech. Publishers and distributors however are primarily business men, who in our society cannot reasonably be expected to do the same, and will not. Therefore it is precisely with the nonobscene book containing "the requisite prurient appeal"⁶ that the necessity for clear legal standards becomes so great.

Any publisher and distributor is bound to know that such a book will appeal to some, and probably to many, solely on the basis of its prurience. The reasonable publisher or distributor must also know that this fact will easily translate into good business and he will want that business. The majority opinion herein now for the first time makes criminality turn upon the dim and uncertain point at which his honest businessman's evaluation dissolves into the cynical "leer of the sensualist." Such a subjective mental standard is impossible to enforce properly.

While the majority opinion purports⁷ to resolve the question of when this subtle mental transition from the

5. See generally Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326 (1957).

6. *Memoirs v. Massachusetts*, 34 U. S. L. Week 4236, at 4237 (decided March 21, 1966).

7. The objective reader of the majority's opinion cannot help but conclude that what the majority took to be defendant Ginzburg's cynicism about the prurience of his fellows became the crux of his guilt.

honest and business-like attitude to the cynical and criminal attitude on the basis of what it presumably took to be "objective" standards—actions and written advertisements, the least analysis shows that the criterion must inevitably be the subjective state of a defendant's mind. The circulars and prefaces and other overt expressions of defendant Ginzburg's supposed mental attitude⁸ are all entirely compatible with a mental attitude which, like D. H. Lawrence's, advocates a sincere and profound philosophy of entire freedom in sexual behavior and discussion, or, even more so, with one espousing the editorial views of a magazine like *Playboy*, which displays a mixed mental attitude—both philosophical and titillating at the same time.⁹

In the face of such ambiguity of intent in the words themselves, this Court concluded (without aid of findings below) that these quasi-philosophical advertisements were not expressions of a sincerely held philosophy, as they purported to be. The Court therefore must have reached an ultimate conclusion as to the sincerity or cynicism of defendant Ginzburg's inner personal motives and based its judgment on that. By so deciding this Court obliges courts in the future to do likewise, since the true panderer will, as many already do, puff his products with cynically chaste statements such as: "This work is not obscene," or "This work comes to you by special decision of the United States Supreme Court,"¹⁰ or cynically refrain from any statement at all. The public will know, but only scrutiny of the defendant's soul and conscience can convict a party who is really guilty under the Court's new standard.

8. See, e.g., footnote 9 of the majority opinion. We cannot believe that this Court has given dispositive weight, in upholding a five year sentence, to the grade school *double entendre* of the mailing gimmick sought for the subject publications.

9. In this regard compare the works of numerous philosopher-sensualists, such as the Marquis de Sade or Jean Genet.

10. Such an advertisement actually appeared in front of a movie house in Philadelphia, Pennsylvania, in the Fall of 1965.

When Milton wrote: "Give me the liberty to know, to utter, and to argue according to conscience, above all liberties,"¹¹ the "conscience" he referred to was the writer's own. He rebuked clerical censors for attempting to judge it. This Court's decision makes trial of conscience the new crux of criminal obscenity prosecutions and inevitably invites repression, as we show below. To promulgate this dubious guide for the future it permitted the defendant Ginzburg to go to prison for five years.

III. The Impact of the New Standard.

The most serious threat to the rights of distributors and publishers who constitute the members of the Bureau, to their businesses and to their customers, the citizens and readers of this country, is the fear of prosecution and persecution for the handling of entirely acceptable publications which involve sex.¹² Only firm and continuing correction by this and other appellate courts has kept these usually self-selected "vigilantes" from imposing their limited views upon the community through harassment of what is for the Bureau's members their livelihood.¹³ Far more common than the "panderer" whom this Court believes it finds criminally exploiting sex for *gain*, is the honest businessman who can be forced to "voluntarily" *suppress* valuable commentary, sexual, political or religious, because he fears *loss* of livelihood through unjustified, but all-too-common prosecution and unofficial harassment. Previously, when a work was declared not obscene on its face, after long and difficult litigation, the distributor could rely on the finality of that decision. The present decision of the

11. MILTON, POETRY & PROSE 718, Modern Library College Ed. (1950) ("Areopagitica").

12. See Note, Extralegal Censorship of Literature, 33 N. Y. U. L. REV. 989 (1958). This Note discusses the numerous works, most of them innocuous, which have fallen subject to censorship in various parts of the country.

13. E.g., *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrant*, 367 U. S. 717; see cases cited *supra*, n. 2.

Court, however, by making the criterion of unlawfulness the setting of the work, rather than the work itself, tears down this climate of confidence in which the honest distributor of literature could operate and indiscriminately invites the Comstock back to persecute and prosecute in each new "setting."

However sincere a distributor may be and however clear his conscience, his handling of a book that offends Comstock convicts that dealer in the self-appointed censor's eye. On trial he will probably be acquitted (though the vagueness of the new criterion makes the nature of exculpatory proof a mystery), but the trial which this Court's new standard will have invited will frighten from the market all books even slightly suspect, in a flurry of self-censorship. And those who do not use self-censorship of border line books will necessarily stand convicted of "pandering" in the public eye for being so "brazen" as to try to make a living from the distribution of "such books."

For example, many of the Bureau's members distribute the book known as *Lady Chatterley's Lover* by D. H. Lawrence. Because of its great notoriety—derived in great measure from past repression and court holdings that it is not at all obscene—it is a book which some people undoubtedly buy because of its appeal to their prurient interest. Some of movant's members may be aware of this fact. They undeniably make their living by publishing or distributing this book among others. Will there now be a new prosecution? Must this Court hear the case of this great and important novel all over again?¹⁴ The honest

14. The likelihood is confirmed by Justice Musmanno, dissenting from a recent decision of the Pennsylvania Supreme Court in *Commonwealth v. Robin*, decided March 22, 1966, overturning, on the strength of *Grove Press v. Gerstein*, 378 U. S. 577, a conviction for selling *Tropic of Cancer*. Forecast the Justice:

"I refuse to accept the thought that once a decision is rendered on any particular subject, this means the last bell has rung, the last whistle has blown, the last nail has been driven, the last rivet

and conscientious distributor will feel safer removing the book from circulation. The same will be true for such literature as *Ulysses*, *Memoirs of Hecate County* or *Tropic of Cancer*, as well as those less savory publications involved in *Manual Enterprises v. Day*, 370 U. S. 478, and similar cases. These will come up not once but presumably time after time, as the local prosecutor finds a changed "setting", a dubious preface, or a titillating cover.

We cannot close without pointing out a distinct and equally grave threat implicit in the majority's decision. In matters of criminal procedure this Court has been scrupulous in safeguarding the rights of the accused, regardless of the nature or magnitude of the crime charged. It has insisted on the constitutional guarantee of counsel¹⁵ and fair trial. Even outside the area of criminal law the Court has been careful to afford procedural due process. Thus, in the case of *Malat v. Riddell, District Director*, 34 U. S. L. Week 4267 (decided March 21, 1966), handed down immediately after the present case, the Court, after construing the Internal Revenue Code, said:

"Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the

has been hammered, the last bus has departed, and all that is left to do is to wait until Judgment Day." Philadelphia Legal Intelligencer, March 29, 1966, p. 8.

To confirm his view that *Cancer* must be tried again despite this Court's ruling, Justice Musmanno resorts to the preface to support his views:

"The preface to 'Cancer' characterizes its worthlessness when it tells the reader:

'Let us try to look at it with the eyes of a Patagonian for whom all that is sacred and taboo in our world is meaningless.'" *Id.* p. 7.

15. *Gideon v. Wainwright*, 372 U. S. 335.

District Court for fresh fact-findings, addressed to the statute as we have now construed it.

Vacated and remanded." ¹⁶

In dramatic contrast, the Court here sustained defendant Ginzburg's conviction expressly and solely on the basis of the supposed state of his conscience when he mailed the articles in question,¹⁷ an issue upon which Ginzburg had not been tried and as to which his counsel had not defended him. Still worse, this Court found the state of his conscience wholly bad and sustained his conviction on that ground alone, with no support at all in the findings of the trial judge who heard defendant and the other witnesses. Finally, upon announcing a new construction giving new reach to the Federal obscenity statute, the Court simply affirmed and did not remand as is the usual custom. Such a procedure on the part of the Supreme Court of South Carolina was held unconstitutional in *Bowie v. City of Columbia*, 378 U. S. 347 (Brennan, J.).

Such disregard of fundamental due process and equal protection by this Court defies explanation. But this brief is not concerned with criminal procedure. The grave danger which lurks in the cavalier special treatment which the majority decision metes out to defendant Ginzburg, is the implicit recognition that in the area of obscenity prosecution the Constitution carves out a lenient exception to the stringent standards it demands in all other areas of criminal law. This, more than the vague new criterion

16. In the course of its *Malat* opinion the Court said:

"As we have often said, 'the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.'"

In the present case, even if the First Amendment permits a statutory prohibition of obscene matter turning on the subjective criterion announced by the Court, 28 U. S. C. § 1461 does not, if read in its "ordinary, everyday sense," extend to the new constitutional limit. Thus this Court denied to defendant Ginzburg protection of the law equal to that afforded Mr. Malat.

17. The decision of the courts below expressly rested on their view of the obscene nature of the contents of the printed works "cover to cover." 224 F. Supp. at 137; 338 F. 2d at 16.

itself, will encourage the eager prosecutor, up for re-election, to try his own novel theory of obscenity, however wrongheaded, and to rationalize that if this Court could change the rules in midstream for Ginzburg, it *might* do so for his current defendant.

Because its decision was uniquely unfair to a criminal defendant and because it lays down a standard dangerous to publishers and distributors everywhere and to free speech, the Bureau urges the Court to rehear, and, after briefs and oral argument on the legality of the new criterion announced by the majority opinion, to reverse the decision below.

Respectfully submitted,

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April 14, 1966.

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER,
INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
REHEARING**

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UNITED STATES OF AMERICA.

**BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.,
AS AMICUS CURIAE IN SUPPORT OF PETITION FOR
REHEARING**

The Interest of the Authors League

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this Petition for Rehearing may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

Summary of Argument

We submit that the principles adopted in the majority opinion denied petitioners their rights of free speech and

press under the First Amendment; and will deny these rights to other authors, publishers and book sellers, in the case of works that would not have been judged obscene under the *Roth* standard prior to March 21, 1966. The reasons for this pessimistic view are set forth in the four dissenting opinions and will not be reiterated here.

In addition, we respectfully submit, the petition for rehearing should be granted, and the convictions reversed, for the following reasons:

1. The new rules adopted in the majority opinion should not be applied retroactively to sustain petitioners' convictions.

2. The "fourth test" added to the *Roth* standard by the majority opinion should be clarified or it will result in a denial of freedom of expression to publishers and sellers of works that are not obscene (under the old or the new standard).

3. Under the rationale of the majority opinion, only the convictions on the counts dealing with advertising should be affirmed; the convictions on the counts dealing with the publications themselves should be reversed. To thus treat separately "offensive" advertising and promotional activities would prevent infringements of the rights of free speech and press with respect to materials which per se are not "obscene".

POINT I

The Revised *Roth* Standard should not be Applied Retroactively to Sustain Petitioners' Conviction.

The previous statements of the *Roth* standard by this Court did not indicate that the methods of selling, advertising or promoting a book, or the nature of its publisher's business, would in any way affect the determination of whether it was, or was not, obscene. On the contrary, the three tests comprising the *Roth* standard related, and by their terms could only relate, to the contents of the book. In fact, the only suggestion that the methods by which, or context in which, a book was sold could effect the issue of its obscenity was made in a manner that clearly indicated it was rejected by the majority of the Court—having been advanced by Chief Justice Warren in his concurring opinion in *Roth v. United States*, 354 U.S. 476, 495 and in his dissenting opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 201.

Therefore, petitioners did not have any notice that a publisher would be jailed under 18 U.S.C. 1461 for selling publications that did not, of themselves, violate all three phases of the *Roth* standard, as reiterated in *Jacobellis v. Ohio* (378 U.S. 184, 191)—because he used advertising materials which, also, did not of themselves violate the three phases of the *Roth* standard. Indeed, it is clear that under the circumstances no lawyer or publisher or author could have divined that a publication which was not of itself "obscene", and advertising materials which were not of themselves "obscene", could be fused so that the publication became "obscene" and punishable under the federal obscenity statute. We therefore respectfully submit

that this new concept should not be applied retroactively to sustain the conviction here.

We are particularly fearful of the example this will set for lower courts. The application of obscenity laws by trial courts has not been uniformly characterized by a zealous concern for defendants' rights of free speech or due process. As Judge Moore noted in *United States v. Klaw*, 350 F. 2d 155, 169 "... most if not all of the censor's defeats have come at the hands of appellate courts ...". We respectfully urge that the retroactive application of the concept adopted in this decision will inevitably and logically lead lower courts to assume that this Court has relaxed the principles of fair notice (*Winters v. New York*, 333 U.S. 507, 509) and the prohibitions against vagueness in measures restraining freedom of expression (*Smith v. California*, 361 U.S. 147, 151; *N.A.A.C.P. v. Button*, 371 U.S. 415, 438) which it has heretofore laid down for them to follow.

POINT II

The Rules Announced in the Majority Opinion Should be Clarified.

In *Jacobellis v. Ohio*, Mr. Justice Brennan noted that the application of an obscenity law "requires ascertainment of 'the dim and uncertain line' that often separates obscenity from constitutionally protected expression" (378 U.S. 184, 187). We submit that the concepts adopted by the majority opinion will make the line dimmer and more uncertain, more frequently.

The opinion permits lower courts in certain circumstances to judge a non-obscene work obscene on the basis of advertising and promotional materials (which in themselves are not obscene). It does not clearly formulate, or identify as such, the test which lower courts must use in determining (i) what advertising or promotional materials fall into the condemned category; or (ii) the circumstances in which such materials can be used to hold obscene a work which is not obscene under the old *Roth* test. Moreover, the opinion does not set forth a clear statement of the test to be applied in determining what other factors of exploitation, if any, may be considered in determining that a work which is not in itself obscene may nonetheless be judged obscene under 18 U.S.C. 1461, or other obscenity statutes.

We believe it is essential that the opinion be clarified because it adds to the test of obscenity factors which, even under the clearest of definitions, are bound to produce a far greater number of erroneous determinations of obscenity by lower courts than we have had under the *Roth* standard, pre-1966. (Again, Judge Moore's comment is worth recalling: "... most if not all of the censor's defeats have come at the hands of Appellate Courts . . .". 350 F. 2d 155, 169). Injecting these new factors will produce and permit far more subjective judgments as to the obscenity of books than does the question of whether the contents of a book *per se* appeal to prurient interests, or are patently offensive, or lack social importance. (By comparison to the new factors introduced by the majority opinion, the standards of the *Roth* test are objective). But without a definitive statement of the test for determining these new factors, identified as such (as in *Jacobellis v.*

Ohio, 378 U.S. 184, 191), the incidence of erroneous judicial determinations of obscenity (and the consequent denial of First Amendment rights) will proliferate. And the burdens of this Court will increase correspondingly.

We submit that unless the majority opinion is clarified, publishers and book sellers, as well as authors, will not be able to determine in many instances whether it is safe to sell works that would, under the old *Roth* standard, have been deemed forms of "constitutionally protected expression".

In this connection, it is imperative to recall this Court's observation in *Smith v. California*, 361 U.S. 147, where the court said,

"... this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." (p. 151)

Moreover, the need for clarification is urgent because ambiguity and lack of certainty with respect to the new concept, will increase "informal censorship" by "threats of prosecution" which is frequently used to "inhibit the circulation of publications" entitled to constitutional protection (Cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67). The more ambiguous the criteria for obscenity, the easier it becomes for a prosecutor to successfully coerce local bookstores into repressing works he objects to.

In addition, we submit that there are other doubts raised by the majority opinion, which should be resolved.

1. There are statements in the majority opinion which indicate that advertising and promotional materials and activities would only be relevant if the challenged publication came very close to, or bordered on, the line drawn by the *Roth* standard, as announced in *Roth v. United States* and *Jacobellis v. Ohio*; and that these materials and activities could not be resorted to where a work clearly did not fail to meet the three-phase standard announced in those opinions. The Court said that the evidence of these materials "serves to resolve all ambiguity and doubt" (p. 7) and that "all that will have been determined is that *questionable publications* are obscene in a context that brands them as obscene as that term is defined in *Roth* . . ." (p. 12) (emphasis ours). However, other statements in the opinion might be construed by lower courts as justifying a conviction of obscenity, because of "offensive" (but non-obscene) advertising materials, even though it was clear that the dominant theme of the work, taken as a whole, did not appeal to prurient interest; or that it was not patently offensive; or that it was not utterly without social value.

We urge that the Court make it plain that advertising, promotional and selling activities would only become relevant in cases where there is a serious doubt as to whether a work is protected under the old *Roth* standard.

We also submit that the Court should make it clear that the *Roth* standard has not otherwise been changed. The majority opinion employs various phrases that lower courts and prosecutors erroneously might assume had replaced, modified or supplemented the *Roth* requirements for judging a work itself. Such phrases as "erotically arousing" (p. 7); "sexually provocative aspects" (pp. 7, 9); "instru-

ment of (the) sexual stimulation" (p. 8); "appeal to sexual curiosity and appetite" (p. 8); "appeal to erotic interest" (p. 4); and "titillation by pornography" (pp. 8, 12) might be read as amendments to the *Roth* requirement that "the dominant theme of the material taken as a whole appeals to prurient interest" or the preliminary condition that the material "goes substantially beyond customary limits of candor in description or representation of such matters"; or the ultimate condition that the work must be "'utterly' without social importance" (*Jacobellis v. Ohio*, 378 U.S. 184, 191).

2. The majority opinion states that "the fact that each of these publications was *created or* exploited entirely on the basis of its appeal to prurient interests strengthens the conclusions that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter." (p. 11) (emphasis ours).

We fear that this language may be read as permitting courts to determine, from the work or otherwise, that the purpose of the creator—the author—was to appeal to prurient interest, even though the work was not obscene under the old *Roth* standard. We respectfully urge that it be made clear that such an inquiry is not permitted. Inquiry into a matter so elusive and subjective as an author's "intent" would fling open the door to wholesale suppression of works entitled to the protection of the First Amendment. We submit that a bookseller should not have to prove that the author of *ULYSSES*, or *LADY CHATTERLY'S LOVER*, or *TROPIC OF CANCER*, or *FANNY HILL* had not "created" such a work "entirely on the basis of its appeal to prurient interests", in order to defend his right to sell it.

3. In this case, the petitioners alone published, promoted and advertised the publications on trial, and sold them directly to readers. But a book is sold through several distributors and wholesalers, and many book stores. And frequently a book is published concurrently by more than one publisher. For example, a novel may be published by one publisher in the original hard cover edition, by one or more other publishers in paperback editions, and by other publishers in hard cover reprint editions, digests, or anthologies.

One of these publishers, or distributors, or bookstores might employ advertising or promotional activities with respect to the book that could be held "offensive" under the majority opinion, or might be engaged in a business that could be adjudged as "pandering" under the opinion. Such conduct should certainly not be attributed to others engaged in publishing, selling or distributing a work that is not obscene under the old *Roth* standard. We urge that the Court make this clear.

Otherwise, the author of a non-obscene book could be denied his freedom of speech and press (through total suppression of his book) because of advertising or promotion conducted by one wholesaler or book store, or by one of several publishers. Or, a publisher could be prevented from selling the book because of advertising done by another publisher, a distributor, or book store. Or one book store could be prohibited from selling the book because of advertising done by another book store or distributor or publisher. We urge that the Court make it plain that where advertising or promotional activities can, under its opinion, be applied to determine the issue of obscenity—

such activities can only be attributed to the person or party who has engaged in them, and cannot be attributed to the book itself, so as to prevent its publication or sale by others who have not engaged in such "offensive" activities. (The same problems would be created if one exhibitor's or distributor's "offensive" advertising of a motion picture could be attributed to the producer, or other distributors or exhibitors).

POINT III

Under the Rationale of the Majority Opinion, Only the Convictions on the Counts Relating to Advertising Should Have Been Sustained.

Petitioners were charged with violating the statute by two separate categories of acts: (i) The advertising of their publications; and (ii) the sale of the publications themselves. We submit that each category of acts should have been judged separately and under the rationale of the majority opinion, only the convictions on the counts dealing with advertising should have been sustained.

It would appear that without petitioners' advertising and promotional activities, their publications, standing alone, were not obscene under the *Roth* standard. The majority opinion assumed that the publications on trial "cannot themselves be adjudged obscene in the abstract" (p. 11). Presumably, if petitioners had not engaged in the advertising, promotional or selling activities condemned in the opinion, and had only sold the publications by use of simple subscription forms, the convictions would have been reversed.

It is equally clear that petitioners' advertising materials provided the offensive element which resulted in the affirmation of their convictions. The majority opinion holds that the advertising

“... tend(ed) to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material.” (p. 7)

We submit that it is the advertising, and not the publications themselves, that perpetrated this offense of “public confrontation”.* It is clear that because the advertising was so “brazen” and explicit, those who were “offended” by such publications would not have purchased the publications themselves; and only those who were not offended by the nature of the publications were likely to purchase them. Moreover, it is obvious that only a small proportion of those who received the petitioners' advertising actually purchased the publications.

The majority opinion is based on the premise that the advertising supplied the elements necessary to render obscene publications that were assumed not to be “obscene in the abstract”. It said that:

“The deliberate representation (in the advertising) of petitioners' publications as erotically arous-

* In its original brief, the Authors League submitted that the dissemination of obscene materials by means which forced them on unwilling readers and invaded their right of privacy could be prohibited. As Mr. Justice Stewart noted, “Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it” (p. 2).

ing, for example, stimulated the reader to accept them as obscene.”

But it is highly unlikely that in the weeks that elapsed between reading the advertising and receiving the publications, any reader would have retained so vivid an impression or titillating effect from the advertising, as to condition responses to the publications that would not have been stimulated by reading the publications alone without knowledge of the advertising. Moreover, advertising could not change one iota the social importance of a work; or its patent offensiveness. (And petitioners tasteless efforts to secure mailing addresses, undisclosed to the public, could not affect the impact of the publications upon readers.)

If petitioners are guilty of any offense under the statute, it is the offense of disseminating objectionable advertising materials to the public. And we urge that such conduct does not warrant sustaining their convictions on counts relating to the sale of publications which “cannot themselves be adjudged obscene in the abstract”.

The majority opinion, in a footnote reference (p. 2), suggests that since the government conceded that the advertising material was not itself obscene, convictions on the counts for mailing advertising could stand only if the publications themselves violated the statute. However, petitioners were charged and convicted with sending circulars which advertised where obscene publications might be obtained. And, Circuit Courts of Appeals have recently sustained conviction of that offense even though neither the advertising nor the publications were obscene, because the advertising represented the publications to be obscene.

In *United States v. Hornick*, 229 F. 2d 120, the Court said:

“As we have already said, information as to where such obscene matter can be obtained shouts loudly from the words used by the advertising of the defendants. We do not think it is necessary that representations made in these advertisements be true. The statute says ‘advertisement * * * giving information.’ The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape.” (at p. 121)

See also:

United States v. Perkins, 286 F. 2d 150.

We submit that “objectionable” advertising materials and activities should be dealt with separately from the publications themselves. This would prevent restrictions from being imposed on the rights of free speech and press of authors, publishers, and booksellers with respect to works which per se are not obscene.

CONCLUSION

It is respectfully submitted that the Petitions for Rehearing should be granted and that the convictions should be reversed.

Respectfully submitted,

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Submitted on Consent of

Office-Supreme Court, U.S.

FILED

the Parties

APR 15 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

42

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EROS MAGAZINE, INC. and LIAISON NEWS
LETTER, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL,
INC., AS AMICUS CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

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**BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL,
INC., AS AMICUS CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 190 members of the Council publish and distribute approximately 90% of all general books. None of the petitioners is a member of the Council.

Because of the Council's interest in safeguarding freedom of the press guaranteed by the First and Fourteenth Amendments of the Constitution, it took steps to and did file an *amicus curiae* brief herein, urging that this Court apply a three-fold test to determine obscenity:

1. That the work must appeal to prurient interest;
2. That the work must be patently offensive; and
3. That the work must be utterly without any redeeming social importance.

The decision of this Court in this case and in *A Book Named "John Cleland's Memoirs" v. Massachusetts*, decided the same day, specifically adopted such a test. But this Court, in the instant case, went further. It also held that the circumstances of a book's promotion, sale and publicity will be examined in determining whether or not the book meets these three criteria, and that those circumstances alone may make a book obscene, even though the book, by itself, is non-obscene.

This brief is being submitted by the Council in order to obtain a reconsideration of the Court's decision to consider circumstances of advertising, promotion and sale as a factor in determining a work's obscenity. The Council believes that the addition of this factor defeats the salutary effects of the adoption of the three-fold criteria. As we stated in our original brief herein, the Council takes no position as to the obscenity or non-obscenity of any publication and, accordingly, it takes no position with respect to the obscenity or non-obscenity of the publications herein involved.

ARGUMENT

The inclusion of the circumstances of advertising, promotion and sale in adjudications as to obscenity unduly restrains the dissemination of constitutionally protected literature.

The opinion of this Court herein states that publications, the contents of which are non-obscene, may, nevertheless, be adjudicated to be obscene if the circumstances of their advertising, selling or promotion are of a pandering nature. Thus, "the deliberate representation" of a work "as erotically arousing" (1) is evidence that the work appeals to prurient interest, (2) "heightens the offensiveness * * * to those who are offended by such material" and (3) may establish that any claim of redeeming social importance is "a spurious claim for litigation purposes" (Op. p. 7). In other words, a pandering advertisement of an otherwise non-obscene book is enough to establish that all three prerequisites for obscenity have been met, thereby vitiating the three-fold test. A book is no longer considered as a whole and judged solely on its own merits; rather, a small portion of a book dealing with sex may be considered along with the advertising of a pandering bookseller as the basis of holding such book obscene.

We submit that consideration of the circumstances of advertising, promotion and sale is particularly irrelevant in determining whether a work has redeeming social importance. The social importance of a work does not turn on the intent of or the characterization given it by its distributor. Nor does it depend on offensiveness to the public; on the contrary, a work which offends the

public may nevertheless be circulated if it has social value. And the inherent social value of a work can in no way be eroded by pandering advertisements. True, the reputation of a work might be sullied by unsavory promotional devices, but its actual social value comes only from within the work itself.

An approach to obscenity which would consider the circumstances of advertising has previously been condemned in the opinion of Mr. Justice Harlan, joined in by Mr. Justice Stewart, delivering the judgment of this Court in *Manual Enterprises v. Day*, 370 U. S. 478, 491 (1962):

“ * * * And, neither with respect to the advertisements nor the magazines themselves, do we understand the Government to suggest that the ‘advertising’ provisions of § 1461 are violated if the mailed material merely ‘gives the leer that promises the customer some obscene pictures.’ *United States v. Hornick* (CA 3 Pa) 229 F 2d 120, 121. Such an approach to the statute could not withstand the underlying precepts of Roth. See *Poss v. Christenberry* (DC NY) 179 F Supp 411, 415; cf. *United States v. Schillaci* (DC NY) 166 F Supp 303, 306.”

By considering advertisements as a key to whether the obscenity criteria have been met, the Court has placed publishers in an extremely precarious position. Since a socially valuable book may be held to be obscene as a result of an advertisement for it, the publisher may no longer rely upon an evaluation of that book's contents to determine whether such book is obscene. As a result of the Court's decision herein, he will refuse to publish many socially valuable books even though his evaluation is that the contents of such books do not render them obscene.

For, as a result of the new conditions for testing obscenity announced by the Court in this case, one bookseller over whom the publisher has no control may convert the publisher's investment in a literary work into a financial disaster by inserting a pandering advertisement. Once a book is adjudged obscene in *one* context (and we can be certain that henceforth most prosecutions and judgments dealing with obscenity will lean on advertising), booksellers will be afraid to sell the book in *any* context and the publisher will be saddled with an economic loss against which he cannot protect himself, occasioned by the sins of another. This threat of economic loss must induce self-censorship and restraint of book dissemination far beyond the careful limits of the three-fold test, and "thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly * * * [and] the distribution of all books, both obscene and not obscene, would be impeded." *Smith v. California*, 361 U. S. 147, 154 (1959). Since the decision of this Court on March 21, 1966, members of the Council have received instructions from important customers to cancel shipments of books not believed by the publishers to be obscene because of possible criminal liabilities which promotion of these books may impose on the seller.

The publisher's difficulty is compounded by the unanswered question of what is a pandering advertisement. To illustrate the difficulties posed by this question: is the following, a typical advertisement which appeared as the main material of an approximately quarter-page advertisement in "The New York Times" of April 8, 1966 for

the motion picture "DEAR JOHN," a work which received wide critical acclaim, a pandering advertisement?

"ACADEMY AWARD NOMINEE:

BEST FOREIGN FILMS OF THE YEAR

'A frank and uninhibited exposition of the onrush of physical desire. It is a stunning picture!—Bosley Crowther, N. Y. Times.

* * * * *

'A tender and lusty study of love. A tour de force of erotic realism! Lovemaking banter . . . as explicit as the law allows!—Time Magazine.

'Astonishingly frank! An unabashed look at real-life-sex. Remarkably uninhibited in its recording of the way lovers talk and touch and think!—Richard Schickel, Life Magazine.

* * * * *

DEAR JOHN

* * * * *

LOEW'S

TOWERS EAST

72nd St. & 3rd Ave."

If this is a pandering advertisement, this motion picture could be adjudicated to be obscene despite the value numerous critics found in it.

A pandering advertisement for a particular book may be ground for subjecting the persons responsible for the advertisement to criminal sanctions. However, such advertising should play no part in determining the obscenity of that book. Otherwise, the dissemination of socially valuable works would be restricted either directly by governmental action or indirectly by prudent publishers fearing to have the merits of their books adversely

adjudicated because of advertising conceived long after the book has been published and over which they have no control. This type of restriction caused this Court to strike down as unconstitutional the ordinance involved in *Smith v. California*, 361 U. S. 147 (1959).

We urge that all adjudications with respect to obscenity be predicated solely upon the contents of the material involved.

Respectfully submitted,

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APR 15 1966

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF

ERNEST ANGELL

IRWIN KARP

EPHRAIM S. LONDON

HORACE S. MANGES

HARRIET F. PILPEL

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**AS AMICI CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

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IN THE
Supreme Court of the United States

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC. and LIAISON NEWS LETTER, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF

ERNEST ANGELL

IRWIN KARP

EPHRAIM S. LONDON

HORACE S. MANGES

HARRIET F. PILPEL

DEAN LOUIS H. POLLAK

WHITNEY NORTH SEYMOUR

HARRISON TWEED

BETHUEL M. WEBSTER

**AS AMICI CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

The above mentioned lawyers hereby respectfully move for leave to file the brief appended hereto as *amici curiae* in support of the motion for a rehearing herein.

The consent of the attorney for Petitioners to the filing of this brief has been obtained. The Solicitor General (through Ralph Spritzer, Esq.) has stated to counsel making this motion that he would file no objection thereto.

The lawyers on behalf of whom this motion is made are seriously interested in the point made by this brief, namely, that the standard of obscenity established by this Court in *Roth v. United States* and *Jacobellis v. Ohio* did not give to the petitioners in this case "fair notice", as required by the First and Fourteenth Amendments—or any notice—that circumstances of advertising, selling or promoting books or the nature of the publisher's business were factors that might render such books "obscene" under 18 U.S.C. Sec. 1461 and therefore that any books sold *before* the decision of this Court herein on March 21, 1966 should not be judged by such additional factors. It is believed that the brief hereto appended presents in broader perspective the dangerous impact of this portion of the decision of this Court than will be presented by the parties themselves on this motion for rehearing.

WHEREFORE, it is urged that the abovementioned Movants be granted leave to file herein the appended brief as *amici curiae*.

Respectfully submitted,

ERNEST ANGELL,

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BRIEF OF

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WHITNEY NORTH SEYMOUR

HARRISON TWEED

BETHUEL M. WEBSTER

AS AMICI CURIAE

This brief is submitted by the above mentioned lawyers as *amici curiae*, in support of the Petition for Rehearing herein. The undersigned have no connection with the petitioners and are motivated in taking the position set forth herein solely in the interest of opposing what seems to them to be an unjust retroactive application of criminal law.

The Court ruled on March 21, 1966 that although petitioners' publications may not "themselves be adjudged

obscene in the abstract", they can nonetheless be held obscene because of factors other than their contents—to wit, the circumstances of their sale, advertising and promotion.

This brief is not addressed to the question of whether these additional factors should be applied in determining whether works published or sold *after* March 21, 1966 are obscene (nor is it addressed to the question of whether the publications themselves are obscene or not). This brief is submitted because we believe that these additional factors should not be considered in determining whether the publications which petitioners sold *before* March 21, 1966 were obscene. We believe that from the moment of its formulation on June 24, 1957 until the morning of March 21, 1966, the standard for determining obscenity, established in *Roth v. United States*, 354 U. S. 476 (1957), did not give "fair notice", as required by the First and Fourteenth Amendments (*Winters v. New York*, 333 U. S. 507, 509 (1948))—or any notice—that circumstances of advertising, selling or promoting a book or the nature of the publisher's business were factors that might render it "obscene" under 18 U.S.C. Sec. 1461.

We believe that Mr. Justice Brennan's opinion in *Roth v. United States* established the standard for determining the issue of obscenity in prosecutions under all federal and state statutes. Those who have had occasion to study the *Roth* opinions and the subsequent opinions of this Court explaining the *Roth* standard, culminating in Mr. Justice Brennan's opinion in *Jacobellis v. Ohio*, 378 U. S. 184 (1964), considered that these explanations of such standard did not give the slightest inkling that circumstances of selling, advertising or promoting or the nature of the publisher's business would have any bearing on

the issue of obscenity. On the contrary, from *Roth* to *Jacobellis*, the careful explanations of the standard in Mr. Justice Brennan's opinions served to emphasize that the question of obscenity involved only the *contents* of the work on trial. Its three-element test focused entirely on the contents of the work—whether *its* dominant theme appeals to prurient interest; whether *its* descriptions so exceed the bounds of candor as to be patently offensive; whether *it* is utterly without social value.

In *Roth*, the Court said it is "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for *material* which does not treat sex in a manner appealing to prurient interest" (354 U. S. at p. 488). And the standard was stated unequivocally—"obscene *material* is *material* which deals with sex in a manner appealing to prurient interest" (p. 487). That this was *the* standard, the opinion leaves no doubt. It was identified as the "substituted standard [which] provides safeguards adequate to withstand the charge of constitutional infirmity" (p. 489). It was the "proper standard for judging obscenity * * * giv[ing] adequate warning of the conduct proscribed * * *" (491). (Emphasis ours)

This concept that the standard adopted in *Roth* was *the* test for determining the "constitutional issue" of obscenity and that the *Roth* standard applied solely to the contents of a work was confirmed by Mr. Justice Brennan's opinion in *Jacobellis v. Ohio*, 378 U. S. 184, 191. Mr. Justice Brennan said:

"The question of the *proper* standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that *the test*

for obscenity enunciated there—‘whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,’ 354 U. S. at 489 1 L. ed. 2d at 1509—is not perfect, we think any substitute would raise equally difficult problems and”

he concluded:

“we therefore adhere to *that standard*.” (p. 191) (Emphasis ours).

We submit that this reaffirmation of the *Roth* standard on June 22, 1964—as *the* test of obscenity—did not give “fair notice”, or any notice, that the “constitutional issue” of obscenity would turn on anything other than the contents of a work. This reaffirmation gave no notice that a work which was not *per se* obscene under the standard set forth on page 191 of volume 378 of the United States Reports, could nonetheless be judged obscene if (as the majority now holds):

it was “openly advertised to appeal to the erotic interests of * * * customers”; or

“if it was originated or sold as stock in trade of the sordid business of pandering”; or

if “The leer of the sensualist also permeate[d] the advertising”.

However, there is another circumstance which led the petitioners, prior to March 21, 1966, to believe that circumstances of selling, advertising and promotion (and indeed “pandering”), were irrelevant under the *Roth* standard. For, the view that such circumstances should be considered was set forth in the *dissenting* opinion of Chief

Justice Warren, in *Jacobellis v. Ohio*, 378 U. S. 184, 201. He said:

"In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene."

And, in support of this proposition, he cited, in a footnote, that advertisements for the motion picture on trial:

"In the instant case, for example, the advertisements published to induce the public to view the motion picture provide some evidence of the film's dominant theme. * * *"

Mr. Justice Brennan's opinion in no way approved these factors, or made room for them in the *Roth* standard. Moreover, Chief Justice Warren had previously expressed the same view in a *concurring* opinion in *Roth*; and there Mr. Justice Brennan's opinion for the majority in no wise recognized or accepted that view as part of the *Roth* standard. There, Chief Justice Warren said:

"It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (p. 495)

We submit that it was impossible for petitioners (or even attorneys experienced in this field) to know or predict, prior to March 21, 1966, that so drastically different an approach to the definition of obscenity—embodied in a concurring opinion in one case and in a dissenting

opinion in the most recent authoritative case—would now emerge as an additional and heretofore *undisclosed* element of the *Roth* standard.

In *Winters v. New York*, 333 U. S. 507, 509 (1948), this Court held that under the First and Fourteenth Amendments a “statute limiting freedom of expression” must “give fair notice of what acts will be punished * * *.” This principle, as the Court has affirmed in many decisions since, is essential to the preservation of First Amendment protection for freedom of expression. Certainly the principle must apply to the *Roth* standard, for it is, beyond doubt, a part of every federal and state statute punishing obscenity.

In *Bowie v. City of Columbia*, 378 U. S. 347 (1964), this Court held that

“when [an] unforeseeable [judicial] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.” *Id.*, at 354-355.

In *James v. United States*, 366 U. S. 213 (1961), it was held that conduct consistent with the Court’s prior interpretation of a criminal statute could not be the basis for a conviction under the statute as subsequently construed. The Court held that the new interpretation had to be established “in a manner that will not prejudice those who might have relied on [the old one].” 366 U. S. at 221, 242.

In *Smith v. California*, 361 U. S. 147 (1959), Mr. Justice Brennan stated:

“stricter standards of permissible statutory vagueness may be applied to a statute having a poten-

tially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." (p. 151).

We believe that to sustain Petitioners' conviction in this case on the basis of their advertising, selling or promotion—or the nature of their "business"—would violate the letter, and more important, the spirit of *Winters, Smith and Bowie*.

If advertising, selling and promoting, or the nature of a publisher's business, were to be considered in determining the "constitutional issue" of obscenity prior to March 21, 1966, Petitioners were entitled to "fair notice" of that fact. In our opinion, the pronouncements of the *Roth* standard in *Roth* and *Jacobellis* did not give them such notice.

We urge that the Petition for Rehearing be granted and that the issue of whether the publications *in this case* are obscene or not, be determined solely on the basis of their contents.

Respectfully submitted,

ERNEST ANGELL,

Attorney for Ernest Angell, Irwin Karp, Ephraim S. London, Horace S. Manges, Harriet F. Pilpel, Whitney North Seymour, Harrison Tweed and Bethuel M. Webster, all of New York, N. Y., and Dean Louis H. Pollak, of New Haven, Conn.,
Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

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MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA, AMICI CURIAE IN SUPPORT
OF PETITION FOR REHEARING**

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UNITED STATES OF AMERICA,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

A bare majority of this Court has affirmed the petitioner's five year prison sentence for nothing more than sending copies of a magazine, a pamphlet and a book through the mail.

With the Government conceding and the Court assuming that the mailed material was, standing alone, protected by the First Amendment,¹ the majority accomplished this re-

¹ See majority opinion, Slip Op., p. 2: "... the prosecution ... assumed that, standing alone, the publications themselves might not be obscene. We ... assume without deciding that the prosecution could not have succeeded [without proof extrinsic to the printed matter on its face]." And see majority opinion, Slip Op., p. 3, n. 5: "... we accept the Government's concession ... that the prosecution rested upon the manner in which the petitioners' sold the *Handbook*; thus our affirmance implies no agreement with

sult by "an astonishing piece of judicial improvisation"² against which petitioner had no opportunity to defend³ and which further obscures the already muddied waters of the law of obscenity as it affects constitutional protection of free expression.

Apparently dissatisfied with "the perhaps inherent residual vagueness of the *Roth* test"⁴ and with the Court's approach in obscenity cases since *Roth* in which "it has regarded the materials as sufficient in themselves for the determination of the question",⁵ the majority now holds that "the question of obscenity may include consideration of the setting in which the publications were presented".⁶ Thus, publications not obscene on their face under *Roth* standards may be transformed into obscenity if "originated or sold as stock in trade of the sordid business of pandering—the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their

the trial judge's characterizations of the book outside that setting." See also the majority's characterization of the printed material as "publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract . . ." Slip Op., p. 11. And see comments of Harlan, J., dissenting, Slip Op., p. 2: ". . . the Court in the last analysis sustains the convictions on the express assumption that the items held to be obscene are not, viewing them strictly, obscene at all. . . ."; and Stewart, J., dissenting, Slip Op., p. 3: "The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment."

² Slip Op., p. 3, Harlan, J., dissenting.

³ *Amici* will not belabor the fact that petitioner stands convicted by a theory of law never urged by the Government or the courts below, and never briefed or argued before this Court. See Black, J., dissenting, Slip Op., pp. 2-3, and Petition for Rehearing.

⁴ Majority opinion, Slip Op., p. 12, n. 19.

⁵ *Id.* at p. 2.

⁶ *Ibid.*

customers".⁷ "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that act may be decisive in the determination of obscenity."⁸ Apparently this variable standard of obscenity, which depends upon proof extrinsic to the publications themselves, is to be applied only "in close cases"⁹ in order "to resolve all ambiguity and doubt"¹⁰ as to the obscenity of "material lending itself to . . . exploitation of interests in titillation by pornography."¹¹

That this reformulation¹² of the Constitutional standard represents a new and uncharted course in the field of the law of obscenity can scarcely be denied.

The variable concept of obscenity as "a chameleonic quality of material that changes with time, place and circumstance"¹³ first appeared in the concurring opinion of Chief Justice Warren in *Roth v. United States*.¹⁴ Suggesting that "[t]he conduct of the defendant is the central issue, not the obscenity of a book or picture,"¹⁵ he con-

⁷ *Id.* at p. 4.

⁸ *Id.* at p. 7.

⁹ *Id.* at p. 10.

¹⁰ *Id.* at p. 11.

¹¹ *Id.* at p. 12.

¹² Or formulation. See Stewart, *J.*, dissenting, Slip Op., p. 2: "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U. S. at 481, n. 8. And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

¹³ Lockhart and McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 68 (1960).

¹⁴ 354 U. S. 476 (1957).

¹⁵ *Id.* at 495.

curred in the affirmance of the convictions because the defendants "were engaged in the business of purveying . . . matter openly advertised to appeal to the erotic interest of their customers" and "were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."¹⁶

The majority in *Roth* refused to employ such an approach, preferring to attempt to articulate constitutional standards for judging the materials themselves,¹⁷ and Mr. Justice Harlan, dissenting in *Roth*, specifically rejected the variable concept of obscenity.¹⁸

Until *Jacobellis v. Ohio*,¹⁹ no further support on the Court for the "variable" concept of obscenity could be mustered. In *Jacobellis*, however, the Chief Justice and Mr. Justice Clark, dissenting, would have affirmed the conviction of the motion picture exhibitor at least in part upon the ground that the promise of sexual titillation in the published advertising for the film rendered the film itself obscene.²⁰ But Mr. Justice Goldberg, concurring, explicitly rejected the notion that "the exaggerated character of the advertising rather than the obscenity of the film is to be the Constitutional criterion".²¹ Moreover, in *Manual Enterprises, Inc. v. Day*,²² Mr. Justice Harlan, in the prevailing opinion, took occasion to remark:

¹⁶ *Id.* at 495-6.

¹⁷ *Id.* at 488, 490.

¹⁸ *Id.* at 507-508.

¹⁹ 378 U. S. 184 (1964).

²⁰ *Id.* at 201, n. 2.

²¹ *Id.* at 198.

²² 370 U. S. 478, 491 (1962).

"And, neither with respect to the advertisements nor the magazines themselves, do we understand the Government to suggest that the advertising provisions of [18 U.S.C. §1461] are violated if the mailed material merely 'gives the leer that promises the customer some obscene pictures' *United States v. Hornick*, 229 F. 2d 120, 121. *Such an approach to the statute could not withstand the underlying precepts of Roth*. See *Poss v. Christenberry*, 179 F. Supp. 411, 415; cf. *United States v. Schillaci*, 166 F. Supp. 303, 306." (Emphasis supplied.)

Amici believe that the new approach employed by the majority to affirm the petitioner's conviction raises grave constitutional implications for freedom of expression, quite apart from the mailed material here involved and the "sordid business" in which petitioner was engaged.

While *amici's* skepticism as to the ultimate value of *Roth* and its progeny as a tool for separating suppressible from non-suppressible utterance is a matter of record,²³ a number of additional matters raised by the majority opinion in the instant case further debilitate the formula there enunciated.

I.

Although the determination of the social importance of forms of expression as a test of whether they may be constitutionally suppressed is fraught with difficulty,²⁴ the

²³ See Brief of American Civil Liberties Union and American Civil Liberties Union of Pennsylvania in the case at bar; see also Brief of American and Ohio Civil Liberties Unions in *Jacobellis v. Ohio*, 378 U. S. 184 (1964).

²⁴ See discussion of this problem in our *amici* brief on the merits, pp. 32-37.

rule now expounded by the majority for the first time operates to suppress publications with conceded social importance.²⁵ And it does so on the basis of advertising which was itself not obscene²⁶ and which described materials which were by definition not obscene either.²⁷

II.

The majority in *Memoirs v. Massachusetts*²⁸ reaffirms the holding in *Roth* and subsequent cases that before a publication may be constitutionally found to be obscene "three elements must coalesce: it must be established that (a) the dominant theme of the *material* taken as a whole appeals to a prurient interest in sex; (b) the *material* is patently offensive because it affronts contemporary com-

²⁵ Majority opinion, Slip Op., p. 9. But see Kalven, *Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Review 13-14: "If the obscene is constitutionally subject to ban because it is worthless, it must follow the obscene can include only that which is worthless."

²⁶ Majority opinion, Slip Op., p. 2, n. 4. One reflects with some incredulity that here the majority concedes that "the convictions on the counts for mailing the advertising stand only if the publications [are obscene]," then finds the publications obscene because of the salacious (but not obscene) manner in which they were advertised, and finally affirms the advertising count convictions on the ground that the advertised publications were obscene. Such bootstrap arguments, reminiscent of the two lions who devoured each other and were never seen again, have been rejected before by this Court. See *Johnson v. United States*, 333 U. S. 10, 15 (1947) (attempted justification of arrest by search and search by arrest explicitly rejected).

²⁷ Majority opinion, Slip Op., p. 5, n. 9. "The advertisements . . . promised candor in the treatment of matters pertaining to sex and at the same time proclaimed that they were artistic or otherwise socially valuable. In effect, then, these advertisements represented that the publications are *not* obscene." Douglas, *J.* dissenting, Slip Op. p. 3, n. 3.

²⁸ 34 U. S. Law Week 4236 (March 21, 1966).

munity standards relating to the description or representation of sexual matters; and (c) the *material* is *utterly without redeeming social value.*"²⁹ (Emphasis supplied.)

But the rule of the instant case makes it possible to find obscenity without any of these elements.

Where prurient interest is not clearly demonstrable from the publication itself, "[t]he deliberate representation of petitioners' publications as erotically arousing . . . stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content."³⁰

Where the patent offensiveness of the material is dubious, "the brazenness of [the pandering] appeal heightens the offensiveness of the publications to those who are offended by such material" and would tend to force public confrontation with the potentially offensive aspects of the work."³¹

And where the social value of the publications whose suppression is sought is not in doubt, "the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality".³²

Even the delicate scale which determines whether prurient appeal of a publication is its dominant theme or merely a concomitant of isolated passages is weighted by the proprietary thumb of the "pandering" element.³³

²⁹ Majority opinion, *Memoirs v. Massachusetts*, Slip Op., p. 5.

³⁰ Majority opinion, *Ginzburg v. United States*, Slip Op., p. 7.

³¹ *Ibid.*

³² *Ibid.*

³³ *Id.* at pp. 7-8.

Thus a publication which is not patently offensive, which has social value and whose dominant appeal is not to prurient interest, may be held obscene merely by applying the "pandering" test *four times* to satisfy the defect in each element and thereby effect the necessary combination to permit suppression of the material!

The retreat from constitutional principle implicit in applying the "pandering" test to all of the elements is manifest. Quite obviously, the application of the same "pandering" element to each of the criteria of obscenity independently gives undue weight to behavior which is not itself obscene. By reducing the requirements of proof of each element of obscenity, the "leer of the sensualist",³⁴ the sexy wink or the salacious promise of sexual titillation, not in themselves obscene, dilute the proof of obscenity to well below what has been held to be the constitutional minimum.

But apart from the cumulative affect of non-obscene behavior as proof of obscenity, the establishment by the majority of a relationship between "pandering" and each of the elements of obscenity strains logic to the breaking point.

How does "pandering" establish the fact that the *dominant theme* of the material appeals to prurient interest? How can the mere mention in advertising of an obscure scene in a novel of obvious literary merit transform an isolated passage into the dominate theme? Isn't this determination necessarily accomplished by an objective analysis of the material itself, not the purveyor's motivation?

³⁴ *Id.* at p. 5.

How can *patent offensiveness* be enhanced by leering advertising which is not itself obscene? The publication either "goes substantially beyond customary limits of candor in description or representation of [sexual] matters"³⁵ or it does not, depending upon what a judge, jury or appellate court may determine. A conception of customary limits of candor which varies with the motivation or leering behavior of the distributor defies imagination. Does a photograph of a woman in a modest bathing suit become patently offensive by operation of law merely because it is exhibited with a salacious wink or a prurient smile?

And what of material with *social value* which is somehow contaminated by the impure motivations of the seller? The sole justification in *Roth* for removing obscene expression from the protections of the First Amendment was that it was worthless to society. How, then, by any stretch of logic can material be suppressed, or a purveyor punished for selling it, if it has any value whatever to society?

III.

But, the majority tells us, this rule applies only in "close cases".³⁶ If the *Roth* standards applied to the material itself are inherently vague,³⁷ how much more vague is this new standard which invokes a pervasive element "in close cases"? If, by consideration of the publications themselves, "protected expression . . . is often separated from obscenity only by a dim and uncertain line",³⁸ how much more

³⁵ *Jacobellis v. Ohio*, 378 U. S. 184, 191 (1964).

³⁶ Majority opinion, Slip Op., p. 10.

³⁷ *Id.* at p. 12, n. 19.

³⁸ *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963).

dim and uncertain is the distinction between obscene publications, "close cases" and non-obscene "non-close cases"? If a publication, considered by itself, satisfies none of the criteria which must "coalesce" before a finding of obscenity may be made, as here, is it a "close case"? Does it "lend itself to . . . exploitation of interests in titillation by pornography"? If so, what material dealing with sex does not?

Although the *Roth* majority disposed of the argument that its standards were unconstitutionally vague³⁹ the new "pandering" criteria applicable to "close cases" poses additional problems which require re-examination of the claim of vagueness.⁴⁰ And apart from the question of vagueness, what is it about publications with some sexual content, non-obscene in the abstract and with at least some claim to First Amendment protection, which compels them as a matter of constitutional law to be advertised, distributed and sold in more pristine fashion than "lotions, tires, food, liquor, clothing, autos and even insurance policies"⁴¹ to which no First Amendment considerations apply?

³⁹ But see *Ginzburg v. United States*, majority opinion, Slip Op., p. 12, n. 19.

⁴⁰ See Black, *J.*, dissenting, Slip Op., p. 3: "... I think that the criteria declared by a majority of the Court . . . as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so *vague and meaningless* that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him." (Emphasis supplied.)

⁴¹ Douglas, *J.*, dissenting, Slip Op., p. 1. His conclusion is noteworthy: "The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it."

IV.

Another dangerous seed is left to germinate in this Court's majority opinion. Finding that in distributing the publications in question "[p]etitioners . . . deliberately emphasized the sexually provocative aspects of the work", and "proclaimed its obscenity", the Court affirms the trial court's approach of "taking [petitioners'] own evaluation at face value and declaring the book as a whole obscene despite the other evidence."⁴² Quite apart from the fact that the record demonstrates that petitioners' advertising actually proclaimed the *non-obscenity* of their publications,⁴³ permitting the purveyor's characterization of the publication to control the constitutional determination of whether it may be suppressed as obscene breaks sharply with the underlying philosophy of *Roth*.

Closely allied with the concept of letting the intent of the author, publisher or distributor play a crucial role in the determination of the obscenity of the work,⁴⁴ the teaching of *Roth* is that it is *the effect of the material on those it reaches* which is the litmus of obscenity,⁴⁵ not "merely that the disseminator or publicizer thinks such appeal exists."⁴⁶ For if a leering attempt to create pornography fails and a literary gem is inadvertently born instead, so-

⁴² Majority opinion, Slip Op., p. 9.

⁴³ See note 27, *supra*.

⁴⁴ Also implicit in the majority opinion; see majority opinion, Slip Op., p. 7, n. 11. The reference is to the *obscenity of the material* as distinguished from the requisite intent necessary to sustain an obscenity conviction.

⁴⁵ See 354 U. S. at 490.

⁴⁶ *United States v. Klaw*, 350 F. 2d 155, 166 (2d Cir. 1965).

ciety's interest in preserving it from suppression is no less than if the same beneficial result had been intended by its creator. The focus of governmental power to suppress noxious literature, if such power there be, must be upon the *effect* of the material on its potential audience and not upon the character of the author or disseminator, the cleanliness of his mind, or the purity of his soul. In short, the evil, at least for the purpose of governmental regulation, must be in the eye of the beholder, not in the mind of the purveyor.

V.

We come now to perhaps the greatest mischief, in the view of *amici*, of the majority opinion. In order to put an end to petitioner's "sordid business"⁴⁷ without inhibiting "the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art,"⁴⁸ the majority articulates a rule which applies to some booksellers⁴⁹ but not to others.⁵⁰ The Court's ruling has been recognized as "a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury or judge may not find him or his business agreeable".⁵¹

It would have seemed hardly necessary to remind the Court of its obligation to even-handed justice, particularly in the sensitive area of First Amendment rights. For,

⁴⁷ Majority opinion, Slip Op., p. 4.

⁴⁸ *Id.* at p. 12.

⁴⁹ Petitioners in *Ginzburg v. United States*.

⁵⁰ G. P. Putnam's Sons in *Memoirs v. Massachusetts*.

⁵¹ Harlan, *J.*, dissenting, Slip Op., p. 2.

"In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother."⁵²

.

The standard enunciated in this case by the majority of the Court to separate obscenity from protected speech transforms the "inherently vague"⁵³ *Roth* test into a confused, obscure and "tangled state of affairs".⁵⁴ As Mr. Justice Black observed, "[N]ot even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."⁵⁵

The majority's attempt in this case, by patchwork repair, to revamp *Roth's* standards is responsible for the present uncertain posture of the law of obscenity. In our judgment, the confusion which exists today is a manifestation of a basic flaw in the underlying premise of *Roth*: that expression which deals with sex in a particularly offensive manner may be labeled "obscene", and thereafter by a metamorphosis of nomenclature and classification, it becomes unprotected expression. By embarking upon the thankless and futile project of suppressing speech "not

⁵² Stewart, J., dissenting, Slip Op., p. 4.

⁵³ Majority opinion, Slip Op., p. 12, n. 19.

⁵⁴ Harlan, J., dissenting in *Memoirs v. Massachusetts*, Slip Op., p. 1.

⁵⁵ Black, J., dissenting in *Ginzburg v. United States*.

because it incites but because it offends",⁵⁶ this Court has generated more complex problems than it has solved.

In an area where "government may regulate . . . only with narrow specificity"⁵⁷ and with "sensitive tools"⁵⁸ and "where even reasonable precision is utterly impossible"⁵⁹ this Court has adhered to the *Roth* approach despite an inability to obtain a working consensus among its members nor articulate sufficiently detailed working principles for the classification of utterances which *Roth* compels to guide the state and federal courts and legislatures upon whose performance the preservation of freedom of speech must ultimately depend. And it has refused to abandon the *Roth* experiment despite the sharp criticism of Mr. Chief Justice Warren,⁶⁰ and Justices Black,⁶¹ Douglas⁶² and Harlan,⁶³ despite Justice Stewart's narrow interpretation of *Roth* which limits it to its facts⁶⁴ and despite the admission of

⁵⁶ Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Columbia L. Rev. 391, 393 (1963).

⁵⁷ *N. A. A. C. P. v. Button*, 371 U. S. 415, 433 (1964).

⁵⁸ *Speiser v. Randall*, 357 U. S. 513, 525 (1958).

⁵⁹ *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 137 (1949).

⁶⁰ *Roth v. United States*, 354 U. S. at 488-489 (concurring opinion).

⁶¹ *Smith v. California*, 361 U. S. 147, 157 (1959) (concurring opinion).

⁶² *Roth v. United States*, 354 U. S. at 512-514 (dissenting opinion).

⁶³ *Id.* at 497-498 (concurring in part and dissenting in part).

⁶⁴ *Jacobellis v. Ohio*, 378 U. S. 184, 197 (1964) (concurring opinion). See also *Ginzburg v. United States*, Stewart, J., dissenting, Slip Op., pp. 2-3.

its proponents that the *Roth* formula "is not perfect",⁶⁵ raises "difficult problems"⁶⁶ and is afflicted with "perhaps inherent residual vagueness."⁶⁷ The negative reason for adhering to *Roth*—"that we should try to live with it—at least until a more satisfactory definition is evolved"⁶⁸ is not persuasive. "[T]he difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp."⁶⁹

Amici urge this Court to reconsider the ill-conceived amendment of *Roth* which the majority opinion in the instant case has articulated, to recognize that the dissatisfaction of most of the members of this Court with *Roth* as a standard for suppression of expression stems from the inherent illogic and unworkability of the "labeling" process condemned in *New York Times v. Sullivan*,⁷⁰ and to apply to utterances concerning sex the formula which it employs in determining the suppressibility of other forms of expression—the protective umbrella of the "clear and present danger" standard of the First Amendment. For as this Court has made abundantly clear:

"Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing in-

⁶⁵ *Jacobellis v. Ohio*, 378 U. S. 184, 191 (1964).

⁶⁶ *Ibid.*

⁶⁷ *Ginzburg v. United States*, majority opinion, Slip Op., p. 12, n. 19.

⁶⁸ *Jacobellis v. Ohio*, 378, U. S. 184, 200 (1964) (concurring opinion).

⁶⁹ *United States v. Klaw*, 350 F. 2d 155, 165 (2d Cir. 1965).

⁷⁰ 376 U. S. 254, 268-269 (1964).

terest to mankind through the ages; it is one of the vital problems of human interest and public concern.”⁷¹

All forms of expression dealing with matters of public concern—whether they deal with sex or not—are entitled to First Amendment protections. The compelling reasons for such a result are eloquently capsulized by Mr. Justice Stewart:

“Censorship reflects a society’s lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman’s intrusive thumb or a judge’s heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.”⁷²

* * * * *

This brief returns to its place of beginning. A man has been sentenced to spend five years in prison for mailing copies of a magazine, a pamphlet and a book—publications he could not have known in advance of this Court’s opinion might involve him in criminal activity. A man’s liberty has been sacrificed to the changing winds of constitutional

⁷¹ *Roth v. United States*, 354 U. S. 484, 487 (1957).

⁷² Stewart, *J.*, dissenting, Slip Op., pp. 1-2.

doctrine. His conviction has been affirmed by a bare majority of this Court upon a theory rejected by prior decisions of this Court—a theory never urged by the Government nor employed by the courts below to support his conviction—a theory against which he has never had an opportunity to defend and which has never been argued or briefed in this Court—a theory which is replete with dangerous implications for freedom of expression and which demands reconsideration and ultimate discard.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR
PERIODICAL DISTRIBUTORS ASSOCIATIONS IN
SUPPORT OF PETITION FOR REHEARING**

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**BRIEF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR REHEARING**

STATEMENT

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to this action, in support of petitioners' petition for rehearing.

INTEREST OF THE *AMICUS CURIAE*

CPDA is a trade association representing almost 700 independent wholesale distributors of newspapers, paperback books and periodicals, located throughout the United States. These wholesalers are often the focus of efforts by public officials and private groups attempting to prevent the distribution of "objectionable" publications. Their liberty as well as their livelihood depends on their knowing

whether the publications they distribute are constitutionally protected. If they cannot know this with reasonable certainty their only protection lies in refusal to distribute all publications as to which any objection, not obviously frivolous, is made. When they are forced to follow this course, the public, which is denied access to controversial non-obscene publications, is the loser.

This Court's recent decisions in this and related obscenity cases* have created such confusion concerning the standard by which obscenity is to be judged that First Amendment rights are seriously being impaired. Wholesalers are no longer certain whether many publications, previously assumed to be constitutionally protected, may safely be handled. As a result they must reluctantly accede to all but the most absurd demands of state or self-appointed censors. They support this petition for rehearing in the hope that upon rehearing this Court will remove the uncertainty which plagues their industry and seriously interferes with the distribution of publications throughout the United States.

THE PRESENT CONFUSED STATE OF THE LAW OF OBSCENITY SERIOUSLY INTERFERES WITH THE DISTRIBUTION OF NON-OBSCENE LITERATURE. THIS COURT SHOULD, THEREFORE, GRANT THE INSTANT PETITION AND, UPON REHEARING, CLARIFY THE AMBIGUITIES INHERENT IN ITS EARLIER DECISION IN THIS CASE.

No group of persons read this Court's latest obscenity decisions with greater concern than did the 700 independent wholesalers on whose behalf this brief is submitted, for no branch of the nationwide network through which rapid

**A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of the Commonwealth of Massachusetts* (No. 368—October Term, 1965) and *Edward Mishkin v. State of New York* (No. 49—October Term, 1965).

distribution of dated periodicals and timely books is achieved throughout this country is more vulnerable to the censor's pruning.

At any given time a large wholesaler in a major city is distributing thousands of paperback books and scores of periodicals. None of them are authored, published or edited by him. He obtains most of them from one of the national distributors whose franchises he holds.* He neither controls nor influences the content of the publications or the advertising promoting them.

It is manifestly impossible for the wholesaler to read or review even a fraction of the titles he distributes. Nevertheless, as his community's principal supplier of readily available low-cost reading matter, and as the one person in the community through whose hands most such matter passes on its way to the public, the independent wholesaler is the one person to whom voluntary groups and government authorities interested in controlling the flow of publications into the community turn their attention.

Because he usually lives in or near the community in which his clearly visible distribution business is located, the wholesaler is highly susceptible to community pressures to which authors, publishers and national distributors, far removed from the community, are impervious.

As a member of his community, the wholesaler desires to avoid its censure and, of course, criminal prosecution, however unwarranted. He makes a good living out of the unexceptional publications. Marginal publications, some of which are of social significance, produce only a small fraction of the wholesaler's revenues. Moreover, the wholesaler's experience has encouraged him to believe that the

*Most periodicals and paperback books are distributed through one of 13 national distributors, each of whom is the sole distributor for the publications he distributes. The complete chain of distribution is as follows: publisher to national distributor to wholesaler to retailer to ultimate consumer.

reading public's dollar will purchase one publication if it cannot obtain another. It is thus immaterial to the wholesaler (though not to the publisher and prospective reader) whether he distributes only "safe" publications. This attitude, of course protects the wholesaler at the expense of the public interest.

When the foregoing facts are comprehended, the tremendous impact which this Court's recent obscenity decisions is having upon the distribution of low-cost reading matter throughout the country is better understood.

Prior to March 21 of this year, a wholesaler who was informed that a certain publication might be obscene could decide whether to distribute it in light of the reasonable, comprehensible and stable standards which this Court had announced in *Roth v. U. S.*, 354 U. S. 476 (1957), *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1952), and *Jacobellis v. Ohio*, 378 U. S. 184 (1964). In applying these standards he was required to examine only the publication itself.

Since March 21, however, the wholesaler has been unable to judge whether many publications are constitutionally protected with any degree of certainty. He can no longer conclude that a publication is not obscene because it does not appeal to the prurient interest of the average member of his community; he must now consider whether the publication might appeal to the prurient interest of the members of some deviant group with which he has no familiarity. He can no longer rely upon his examination of the publication itself, but must undertake the impossible task of discovering whether someone else may have advertised the material in such a way that it has become the subject of "pandering".

Finally, if he should be prosecuted for distributing an allegedly obscene publication, the wholesaler can no longer assume that his unavoidable ignorance of its contents will

exonerate him (cf. *Smith v. California*, 361 U. S. 147 (1959)). In the present state of the law, it is at least uncertain whether a wholesaler's general familiarity with material advertising an "obscene" publication will defeat the defense of ignorance. Apparently wholesalers are now required not only to ponder the allegedly pornographic lines between lurid covers, but also to read between the lines of ambiguous and deliberately misleading advertising "come-ons".

Familiar with the insatiable demands of extremist vigilante groups and unable to judge whether many publications are constitutionally protected, wholesalers have no choice but to err on the side of caution. In self defense they must refuse to distribute any publication attacked as obscene by any self-appointed censor until their attorneys have had an opportunity to read the publication, consider the advertising being used to promote it, and discuss the matter with the complainant.* (This "temporary" withdrawal is obviously the equivalent of a permanent ban in the case of "dated" periodicals.)

We recognize that this Court, in all obscenity cases, attempts to balance the interests of public decency with vital First Amendment rights. When the Court attempted to reach that balance in its three obscenity decisions handed down on March 21 of this year it was not able to weigh the unintended effect its holding would have on wholesalers—a vital link in the publication distribution network. This effect is that these wholesalers would be forced to throw out the baby with the bath water. They cannot do otherwise in view of the vigilante pressures to which they are

*CPDA has already taken steps to implement the protective measures described above. Annexed as an appendix to this brief are the texts of letters which all members of CPDA have been advised to send to the publishers whose publications they distribute and to public officials charged with enforcing laws directed against obscene publications.

subjected, the confusion created by this Court's opinions, and the slight financial rewards which they derive from the sale of marginal publications, compared to the unknown risk associated with their distribution. Considering these factors, we suggest that the scales are not now in balance and a modification of the Court's earlier decision is in order.

CONCLUSION

Until this Court clarifies the confusion now pervading the law of obscenity, wholesalers, who control neither the content nor the advertising of the publications they distribute, will refuse to distribute many publications to which objection is made. This will necessarily result in substantial interference with the distribution of many non-obscene publications. Consequently, this Court should grant this petition for rehearing and take advantage of the opportunity to clarify the law of obscenity which a rehearing will present.

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APPENDIX

Suggested Text of Letter to Publishers

Various groups in the areas of our distribution have been very active in recent months in efforts to combat the flood of borderline titles being distributed.

We make an effort to review publications before distribution and in some cases return those which we feel would involve us with law enforcement officials. However, we are neither editors nor censors and we simply cannot adequately review the thousands of titles of books and weekly and monthly and other periodicals which we distribute. As publishers (and the distributors who represent them) you know the nature and contents of publications—and the methods of advertising and promotion—whereas we cannot possibly know what we distribute because of the large volume of materials we handle. For the sake of a few dollars we do not intend to jeopardize our healthy business which is based on distribution of fine periodicals nor do we intend to compromise our moral principles or our community-wide reputation.

We must insist that effective immediately you do not ship us any periodicals or books which do not meet the standards outlined by the Supreme Court, in its three most recent opinions in "obscenity cases". If you are in doubt as to the legality of any title or the sales promotion behind it, do not ship it to us.

*Appendix***Suggested Text of Letter to Law Enforcement Officials**

I may have written at an earlier date either to you or your predecessor explaining that I am the owner of the News Agency which distributes newspapers, magazines and pocket size books in. In any event, and in light of the recent Supreme Court decisions, I want to state a position which has always been my policy in the operation of my business:

Our Company distributes approximately periodicals monthly and, in addition, we have several thousand other titles, mainly books, under continuous distribution. The latter run from thousand year old classics to the most current detective fiction. It is, of course, impossible for us to know the contents of even a fraction of the materials we distribute. However, it has been—and is—our policy to represent responsible national distributors who, as we, hold franchises from responsible publishers. We do not undertake distribution of so-called “fly-by-night” publishers or insubstantial national distributors. And, of course, we cannot be responsible for the many publications which are not distributed by us.

You will understand, of course, that various people have from time to time complained of the contents of Life Magazine, Saturday Evening Post, and other representative publications which are regularly distributed. I cannot possibly, therefore, stay in business and perform my responsibility to the publishers whose franchise I hold and be 100% sure that some person, indeed some group, will not find what I distribute to be objectionable. Yet, I do not want to and will not flaunt the opinion and the holding of any recognized public authority. I am absolutely deter-

Appendix

mined, so far as I can prevent it, not to violate any laws. My reputation and that of the retailers who distribute under the franchises which I hold, are too valuable to jeopardize by the distribution of obscene literature. That is not my business nor the business of my retailers who are, in the most cases, local businessmen and residents of our community.

I wish to state categorically that when a complaint is made to you that a certain issue of a publication is obscene and you are sufficiently convinced of that fact so as to believe that legal action is warranted, if you will contact me, I shall withdraw the publication from circulation immediately in your jurisdiction. It may be that after a careful review, both your office and I will be satisfied that the matter is not obscene. But it is absolutely unnecessary, as far as I am concerned, for you to take any official action to obtain the removal of questionable publications from the stands in your jurisdiction other than for you to call upon me to do so. By the use of this procedure, the public can be protected until all the circumstances are carefully considered and your office and I can have an opportunity to carefully review the publication, which, in the majority of instances, neither I nor the retailer could possibly have read.

In order to make my position on this crystal clear I am enclosing a copy of a letter which I have sent to every publisher whose material I sell and to every distributor who is a source of supply to me.